AN EPITOME OF THE LAW

RELATING TO

CHARTER-PARTIES AND BILLS OF LADING

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AN EPITOME OF THE LAW

AFFECTING

CHARTER-PARTIES

AND

BILLS OF LADING

BY

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PREFACE TO SECOND EDITION.

I AM glad that this little book has been appreciated. A second edition is now called for. The matter contained in the first edition has been revised, and all the important cases which have come before the Courts since the last publication of the Manual have been incorporated in the text.

In reference to charter-parties the following cases will be found set out, more or less fully, in Chapter VII. (Part I.): *Fraser and White* v. *Bee*; *Olsen* v. *Dobell & Co.*; *Steel, Young & Co.* v. *Grand Canary Coal Co.*; *West Hartlepool Steam Navigation Co.* v. *Tagart, Beaton & Co.*; *Hessler & Co.* v. *Tyrer & Co.*; *Aktieselskabet Argentina* v. *Von Laer*; and the *Torbryan.*

In regard to bills of lading, the case of *Borthwick* v. *Elderslie Steamship Co.* is inserted at the end of Chapter I. (Part II.). In

Chapter VII. (Part II.) the cases *Parsons* v. *New Zealand Shipping Co.*; *Rowson* v. *Atlantic Transport Co.*; *Harrison* v. *Huddersfield Steamship Co.*; and *Rathbone Bros. & Co.* v. *David McIver & Sons*, are discussed.

The Addenda contains the latest reported cases on the subject of bills of lading, namely, that of *Packwood* v. *Union Castle Steamship Co.* and the *Arne*.

I trust the book may continue to be of use to business men, for whom it was originally compiled.

LAWRENCE DUCKWORTH.

MIDDLE TEMPLE,
March, 1904.

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PART I.

THE LAW RELATING TO CHARTER-PARTIES.

CHAPTER I.

Lord Tenterden's definition of a Charter-Party—What is included in a Charter-Party Agreement—How Bill of Lading differs from Charter-Party—The words "*the Captain to sign Bills of Lading as presented*" in Charter-Party—Section 169 of the Merchant Shipping Act, 1854 (as amended by Section 143 of the Merchant Shipping Act, 1894)—Person managing Ship on behalf of himself and another Person—Proceedings *in rem* where Vessel clearly guilty of damage—Liability of Ship and responsibility of Owners' Convertible Terms—Unless Charter-Party has interfered with general control of Ship, Owners clearly liable—Case of *Christie* v. *Lewis*.

LORD TENTERDEN, in the fifth edition of *Abbott on Shipping*, at page 163, in speaking of a charter-party, says: "The term 'charter-party' is generally understood to be a corruption of the Latin words *carta partita*, the two parts of this and other instruments being usually written in former times on one piece of parchment, which was afterwards divided by

a straight line cut through some word or figure so that one part should fit and tally with the other as evidence of the original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties. With the same design, indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of indenture. This practice of division, however, has long been disused, and that of indentation is a mere form."

The charter-party agreement is one by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the carriage of goods, on a particular voyage, in consideration of the payment called "freight".

A bill of lading differs from a charter-party in that it is required and given for a single article (*i.e.*, parcel), or more laden on board a ship that has sundry merchandise shipped for sundry accounts, whereas a charter-party is a contract for a whole ship.

If the words "*the captain to sign bills of lading as presented*" are used in a charter-party, they convey not only an authority to the master, but impose an obligation upon him to grant or sign bills of lading in whatever form and to whatever effect he might be required by any person to sign them. Where there is a hiring of the ship with the intention that the charterer shall employ the ship as a general ship for his own profit, when the master signs bills of lading he does so as the agent of the charterer, not of the owner. However, the owner being in possession of the ship by his master and crew, he has rights in respect of

this possession as to claim a lien on goods on board for freight due to him; and he is liable for the acts and negligence of the master as master, irrespective of the contracts entered into by the master with the shippers of goods, as agent for the charterer.

To use other words, the owner, although the ship be so chartered, is clearly liable for a collision arising from the improper management of the ship, and for what the master does within the scope of his genera, authority as master, which cannot be ascribed to his agency for the charterer.

Under section 169 of the Merchant Shipping Act, 1854 (17 & 18 Vic., cap. 104), as amended by section 143 of the Merchant Shipping Act, 1894 (57 & 58 Vic., cap. 60), it is provided that the wife of any seaman, in whose favour an allotment note of part of his wages is made, may recover by summary procedure the sum allotted, with costs, from the owner or any agent who has authorised the drawing of the note. The object of the section is to enable a seaman, when about to leave home on a voyage, to make provision for his wife during his temporary absence; and the mode by which this is done is by enabling him to set apart in the hands of his employer a portion of the wages which he is earning on board, and to give his wife the power of receiving them. In a case decided in the year 1876 M. was the registered owner of a ship called the *Sydney Hall*, and entered into a charter-party with H., by which he *demised* the ship to him for a stated period, and parted with all control over it. H. took possession of the ship, and appointed a master who

engaged W.'s husband as one of the crew, and gave her an allotment note, allotting and requiring the charterer to pay her a certain amount monthly out of her husband's wages. H. became insolvent. It was decided in this case that the above-mentioned section did not, under the circumstances, make the appellant as registered owner, liable to pay the arrears due under the note.[1]

If a person manages the affairs of a ship on behalf of himself and another person on certain terms, the first named is then the agent of the second, and is liable for the acts of the master and his acts. His duties are very similar to those of a ship's husband, and as such his acts would bind the owners. But not if he takes upon himself the liabilities of the vessel, which show that he is not a ship's husband, who never takes any liability of that kind. A man who is bound to hand over to the owners a fixed sum or a fixed proportion of the earnings of the vessel is not a ship's husband; he is *not* the agent of the owner, but a person who works the vessel on his own account.

Where there have been any proceedings *in rem*, and the vessel so proceeded against has been clearly guilty of damage, no attempt has been made in the Court of Admiralty to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Assuming that a vessel is chartered so that the owners have divested themselves, for a monetary consideration, of all power, right and authority over the vessel for a given time, and have left to the charterers the appoint-

[1] See *Meiklereid* v. *West* [1876], 1 *Q.B.D.*, 428.

ment of the master and crew, and suppose in that case the vessel had done damage and was proceeded against in the Admiralty Court, and it is also admitted for the purposes of argument that the charterers and not the owners would be responsible elsewhere, the parties who had received the damage would, by the maritime law, have a remedy against the ship itself. Moreover, where a person has entered into a voluntary contract, by which he has been finally led into mischief, it cannot possibly be contended that that can relieve him from making good the damage which he has done. It is true, that the liability of the ship and the responsibility of the owners are convertible terms. The ship is not liable if the owners are not responsible; and, *vice versa*, no responsibility can rest upon the owners if the ship is exempt and not liable to be proceeded against. This only applies, however, when a person is dealing with damage done by the ship through the act of a mere servant or agent acting not only without authority but unlawfully; and, moreover, the true interpretation of the general proposition of law (given above) depends very much upon the sense in which "owners" is used. Vessels suffering damage from a chartered ship are entitled generally to a maritime lien upon that ship, and look to the *res* as security for restitution. A maritime lien attaches to a ship for damage done through the negligence of those in charge of her, in whosesoever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment authorised by her owners. Whether the damage is done through the default of the servants of the actual

owners, or of the servants of the chartering owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully or out of the scope of his authority.

Unless the charter-party has interfered with the general control of the owners, they are clearly liable. The question will always be *whether the defendants had the possession and care of the vessel by their servants.* It is always a question of fact under whose direction and control the vessel was at the time of the occurrence complained of. When there is a *specific* clause in a charter-party binding the charterer to pay for the seamen, and even for the materials to be consumed by the engines, the reasonable inference is not merely that the owners furnished the crew, but that they had the control of the vessel.

In one case a defendant chartered his ship to the Commissioners of the Transport Service on behalf of the Crown to be employed as a transport, and the ship in the course of such employment made several voyages to foreign ports and back. It was decided that by the terms of the charter-party, coupled with the nature of the service, a temporary ownership passed to the Crown, so that the defendant during the time of such service was *not* to be considered as owner within the charters granted to Trinity House, which impose lighthouse duties, and for buoyage and beaconage on the masters and owners of ships.

In another case the general question depended on these grounds. The defendant, the owner of a ship, contended that he had a lien on the goods on board for the freight due, or on the money received for such

freight. Now, in order for him to have had a lien, he must have had at the time of the asserted exercise of it the *possession* of the ship. He had the possession when he executed the charter-party. And the question was whether by the charter-party he had parted with the possession for the particular voyage? It may here be mentioned that this was not like the case of a common carrier, who has, in point of law, known rights and known liabilities. These depend on the law as it applies to the case of carriers, but the carrier may vary his general liability by special agreement; so may the shipowner, even if he could be treated as a common carrier, and the charter-party constituting the specific agreement between the parties; it was upon the effect of it that the question arose. It was admitted that a ship may be let to hire so as to constitute the party hiring the owner for the time, provided that such appears upon the instrument to be the intent of the parties; and this may be done by apt words of hiring and letting, or by necessary construction. But it was argued that the mere words of hiring and letting would not in themselves invest a party with the possession of the ship if all the provisions of the instrument qualify and restrain the words and show that the hiring and letting were not used in their ordinary sense and signification; in other words, that the construction must be upon the whole instrument, subject to this qualification, that if the separate provisions of the instrument would be manifestly repugnant to giving such a construction to the general words, they ought not to receive it; but if there is no direct repugnance, then the general

words being emphatic and essential words, and words applied to other subjects of known legal operation, such words cannot be rejected, but must operate according to their common and, still more, their received legal import. The general words in that case were on the part of the shipowner "*granted and to freight let*," and of the charterer "*hired and to freight taken*". It was laid down (one of the judges dissenting) (1) that notwithstanding the words of grant, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; and that as the freight per charter-party was to be paid to him by good bills prior to the delivery of the homeward cargo, he had a lien on it for such freight, and (2) that he had a right to receive such freight per bills of lading from the consignees, and had a like lien on such freight when so received.[1]

[1] See *Christie* v. *Lewis*, 2 *B. & B.*, 410, and cases there cited.

CHAPTER II.

Question whether Possession of Ship has been given up to and taken by Charterers—Section 191 of Merchant Shipping Act, 1854[1]—Whether Owners of Ship Chartered to Commissioners of Royal Navy as an Armed Vessel and Injury be done can maintain an Action—General Proposition of Law when a Person does not himself enter into Contract—Two Persons may not improperly be spoken of as the Owner of a Ship—Contract of Affreightment—Primary Duty of the Captain of a Vessel—Injury Happening to Ship Moored at Quay.

THE question whether the possession of the ship has or has not been given up to, and taken by, the charterers, must depend upon the terms of the instrument taken altogether, or upon the purpose and object of it (see also above).

The owner of a ship under a charter-party appointed G. B. to the command, and agreed that G. B. should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden on account of the owner) and proceed with it to Calcutta, and there reload the ship with East India produce, and return with it to London, and upon her arrival there and discharge the intended voyage and service should end. The owner further agreed that a complement of thirty-five men should if possible be kept up, that he would supply the ship with

[1] As amended by Section 167 of the Merchant Shipping Act, 1894.

stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage, in consideration of which G. B. agreed to take the command, and received the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owner for the use and hire of the ship after the rate of 25s. per ton per month, of which £1,000 was to be paid on the execution of the charter-party. It was also further agreed that G. B. should remit all freight bills for the homeward cargo to B. B. & Co. in London, who should hold them as joint trustees for the owner and G. B., that they should be applied to payment of the balance of freight due from G. B., and the surplus (if any) be handed over to him. It was then provided that the owner should have an agent on board, who was to have the sole management of the ship's stores and power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander. C. & Co. in Calcutta, having knowledge of such charter-party, shipped goods on board the vessel for London, which were never delivered there. It was decided that they could not recover.

Section 191 of the Merchant Shipping Act, 1854,[1] gives to the Admiralty Court jurisdiction to try claims for wages and disbursements brought by a master against his owners, and in order to enforce that jurisdiction the court has power to seize the ship of the owners. The questions in a modern case were (1) whether the master's wages were due to him from the owners, and

[1] As amended by Section 167 of the Merchant Shipping Act, 1894.

(2) whether they (the owners) were bound to pay him for such disbursements, as it was necessary from the circumstances of the case that the captain should make on behalf of the owners, and which his position as captain would give him implied authority to make on their behalf. It was held that if he was not their captain he could not charge his wages against them, because it would be absurd to charge his wages against any person who did not employ him. He could not, merely as captain, enforce his claim to disbursements against the owners, unless it was in respect of disbursements which he, as their captain, had implied authority to make on the owners' behalf. If, therefore, he were the captain of the charterers and not of the owners he was certainly entitled to sue them for his wages in the Admiralty Court, and if he was their captain he certainly was entitled by virtue of his position to make disbursements which were necessary for the navigation of the ship. At any rate he was at least entitled to make those disbursements against the owners which were not stipulated for in the charter-party, and which it was not known to him were to be paid by the charterers. Lord Esher (M.R.), however, expressed doubt whether the captain of a vessel was entitled to make disbursements on behalf of the owners which the charterers were bound to make unless he went first to the charterers or their agents and found that they absolutely refused to make them. However, where his position was that the charterers' agent at a foreign port had refused to make disbursements which they had undertaken to make, and the ship could not be navigated without those disbursements, in such a

case he may be entitled to charge such disbursements against the owners. Whether he is the captain of the owners must depend upon the charter-party. There was a stipulation in the charter-party by which in the event of the charterers being dissatisfied with the conduct of the master the owners were to make a full investigation into the matter. The charter-party in this particular case showed that although the captain was to be nominated by the charterers he was to be paid by the owners, to be subject to their orders as to navigation, and to be dismissed by them, if he was so dismissed at all. And it followed from this that he was the owners' captain. If, then, he was their captain, inasmuch as they were bound to maintain the ship in a manner fitted for service, any necessary disbursements made by him in order to preserve the vessel in that condition —and this, of course, includes the provision of a proper crew and the wages of seamen, or repairs to a ship in a foreign port—he (the captain) was bound to pay on behalf of his owners, and was, therefore, entitled to recover the disbursements from the owners.[1]

The question of the liability of the owners of a ship chartered to the Commissioners of the Navy as an armed vessel, which causes injury to another vessel by the misconduct of the persons on board the former while a Commander of the Navy and a Queen's Pilot are on board, may be answered by stating that an action for the injury may be sustained against the owners of the charter-party. But when vessels are hired by the

[1] See the *Beeswing* [1885], 5 *Asp.*, 484.

Government, one of the terms on which they go is obedience to the orders of the officers in command; and under such circumstances, if an accident happens in obeying such an order from a Government officer, the fact constitutes a defence for the owner of the vessel by which the damage is done. This immunity does not depend upon martial law, but on the ground that persons acting under such orders cannot be said to be guilty of negligence.

"It cannot be disputed as a general proposition of law that a person who does not himself enter into a contract can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority; and it is equally indisputable that a liability by reason of a wrong or a tort can only be established by proving either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority."[1]

There may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, may, no doubt, be properly spoken of as the owner, but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who during that time may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers and crew of the ship, pays them,

[1] See per Lord Herschell (L.C.), in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* [1893], *Appeal Cases*, at p. 16.

employs them, and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel rest upon that person who is for those purposes during that time in point of law to be regarded as the owner.

From what has just been said in reference to what person may be constituted an owner, it should be particularly noted that no difficulty need arise when it is thoroughly understood that there may be a person who, although not the absolute owner of the vessel, is during a particular adventure the owner for all the purposes mentioned in the last paragraph. Moreover, there cannot be found in any of the authorities anything which runs counter to this view. Furthermore, no authority can be cited where the owner of a vessel has ever been held liable on a bill of lading, or for a tort in any case in which the master of the vessel, or those who were guilty of the negligence, where they have not been properly described as the servants of the owner. Without doubt a vessel may be chartered, and the charterer may have during its continuance full power to deal with the vessel, to determine her voyage, and to direct the course she shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case it is perfectly clear that, by reason of the relationship still subsisting, the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorised to make, binding the owner.[1]

[1] See *Fraser* v. *Marsh*, 13 *East*, 238.

"A contract of affreightment is only like any other contract, and if you seek to render liable upon it some one who was not in name a party to it, you can only do so by establishing a relationship between the party making it and the party whom you seek to make responsible, which the law recognises as creating that responsibility.

"No doubt when a shipowner enters into a charter-party without parting with the possession and control of his ship and seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the instrument. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice of the limitation must be given to those who deal with the agent in order to disable them from contracting with him. But I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship in order to prevent the servant of the charterer from pledging his credit."[1]

The authorities and text-books are all uniformly to the effect that subject to any stipulations to the contrary in bills of lading and the absence of any notice of a charter, one of the primary duties of the captain of a vessel is to stow the goods carefully. And this is a duty arising upon the mere receipt of the goods for the purpose of carriage, and is one

[1] Per Lord Watson in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (*sup.*).

which would require an express contract to supersede or excuse.

It has been held that an injury which happened to a ship moored at a quay where she was lying, having put back to coal, and which injury was owing to the negligent leaving open of a sea-cock, was "*damage caused by improper navigation*" within the meaning of a deed by which an association of shipowners agreed to indemnify each other against "loss or damage which by reason of the improper navigation of any such ship may be caused to any goods on board". In that case Willes, J., said, "Improper navigation within the meaning of this deed is something improperly done . . . in the course of the voyage".[1] But this case is only an authority for the proposition that the ship need not be in a state of motion in order to be in a state of navigation within the meaning of that word as used in the deed there in question. However, other cases have decided that the word navigation "for some purposes includes a period when the ship is not in motion," as *e.g.*, when she is at anchor. The tendency of the courts is strong to require clear affirmative proof on the part of the shipowner to enable him to claim exemption under exception clauses such as the above-mentioned clause in the charter contained. "The word [navigation] is ambiguous, and being of doubtful meaning it must receive such a construction as is most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exceptions are framed."

[1] See *Good* v. *London Steam Shipowners' Association L.R.*, 6 *C.P.*, 563.

CHAPTER III.

When on Arrival of Ship Charterers claim Benefit of Charter-Party—Courts very disinclined to grant Injunctions except to do a positive Act—The Case of *Rotherfield Co.* v. *Tweedie*—All Charter-Parties to be Stamped—The Main Rule derived as to Interpretation of Cesser Clause in Charter-Party—The word "Demurrage": what it properly signifies—Judgment of Bowen, L.J., in *Clink* v. *Radford* on the term "Demurrage"—Judgment of Fry, L.J., in same Case as to Rule of Construction of Cesser Clause in Charter-Party.

IF, on the arrival of a ship, it has turned out to be for the interest of the charterers to claim the benefit of the charter-party, they sign the document in their possession and procure the benefit of it. If, on the other hand, the speculation has turned out a bad one, they may say there is no charter-party, and may thereby embarrass the defendant in proving the case against them.

The courts are (and always have been) very disinclined to grant injunctions in a form which has no meaning, except so far as they compel a party to do a positive act. The burden is on the defendant to prove that any part of the goods belongs to him when filling the two characters of master and part owner of the ship, and, therefore, being in the latter character one of the parties to the contract. Assuming that the ship goes out with a cargo of prunes,

and she returns to this country with a cargo of prunes, the ship and cargo will be regarded, *prima facie*, as having arrived in fulfilment of the contract. The captain of a vessel is not generally allowed to make any profit by the use of the ship. If he attempts to do so the owners may claim the profits which have so been made, for by seeking to take the benefit of the ship he has placed himself in a situation adverse to his duty, which is to exert all his powers to make the ship useful and beneficial to the owners.

An action was brought to recover balance of freight. The claim was made under an agreement called a "berth" note, the material terms of which were as follows :—

> We hereby beg to confirm arrangement that the steamship R——, of the capacity of —— tons, now due in C—— to-day, is berthed by our O—— correspondents, Messrs. ——, they having engaged, as agents, for owners' account for this steamer on customary O—— berth terms, as sanctioned by the O—— Bourse, about a full cargo of wheat $\frac{\text{and}}{\text{or}}$ other grain $\frac{\text{and}}{\text{or}}$ seed, etc., to be loaded at O—— $\frac{\text{and}}{\text{or}}$ S—— for London, at the rate of 10s. 3d. if loaded at S—— only, and 10s. 9d. if loaded at O—— $\frac{\text{and}}{\text{or}}$ S——, charterers' option, per ton on the guaranteed deadweight capacity of —— tons. . . . Owners guarantee that steamer can carry —— tons deadweight, charterers having full reach and burden of the steamer compatible with her seaworthiness, the same as if she were being loaded for owners' account, charterers paying extra expenses over grain in loading and discharging the vessel.—By telegraphic authority, ——, Limited, as agents.

The R—— was of the deadweight capacity of —— tons. On the Lloyd's freeboard she carried —— tons cargo and bunkers; on the winter load-line she carried just short of —— tons. The steamer went to S——, and there loaded —— tons, and the plaintiffs claimed freight on 361 tons, being the difference between the amount loaded and the —— tons mentioned in the said agreement. It was decided that as this contract was very obscure it was impossible to give it a logical interpretation throughout. The action was brought against the defendants on alternative hypotheses—(1) treating them as charterers, (2) as agents who had warranted that they had engaged a full cargo. The contract or berth note treated the defendants as charterers, and the most probable interpretation was that they intended to take upon themselves the obligations of charterers, and under these circumstances the contract was treated as a contract between owners and charterers. The critical point was the standard by which freight was to be ascertained. The plaintiffs said that the defendants undertook to pay 10s. 3d. on the whole deadweight capacity of the ship—that was upon the whole carrying capacity of the ship; but this contention could not be sustained, and judgment was therefore given for the defendants.[1]

We would particularly point out that all charter-parties must be stamped with a sixpenny impressed or adhesive stamp. The charter-party includes any agreement or contract for the charter of any ship

[1] See *Steamship Rotherfield Co.* v. *Tweedie* [1897], 13 *Times' L.R.*, 183.

or vessel or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel and any other person for, or relating to the freight or conveyance of any money, goods, or effects on board the ship or vessel. Such stamp is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.[1] A charter-party first executed abroad *without being duly stamped* with an impressed stamp may be stamped by any party to it *within ten days* of its being received in the United Kingdom. When a charter-party has been executed it may be stamped with an impressed stamp *within seven days* after its first execution on payment of the duty and 4s. 6d. penalty, and also after seven days from its execution, but within one month, on paying the duty and a penalty of £10; but it cannot afterwards be stamped.[2] An unstamped contract signed by the parties may be given in evidence if the original was stamped.[3] No alteration, *however immaterial* such alteration may be, must be made in a charter-party, or it will be fatal.

In a charter-party the following words occurred: "To be unloaded at the average rate of not less than 100 tons per working day . . . or charterers to pay demurrage at the rate of 4d. per ton register *per diem* . . . the charterers' liability under this charter-party to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage".

[1] See sec. 49 of the Stamp Act, 1891.

[2] See secs. 50 and 51 of the Stamp Act, 1891.

[3] See *Smith* v. *Maguire* [1858], 1 *F. & F.*, 199.

In an action by the shipowner against the charterers to recover damages for detention at the port of loading, it was decided that the word "demurrage" did not cover damages for undue detention at the port of loading, and that therefore the cesser clause did not exempt the charterers from liability for the delay.[1]

"The main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion." To use other words, it cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract. If that be true, then the question in every case will depend upon this, whether if the court applies the cesser clause to the particular breach complained of, and so decides the charterer to be free, the shipowner has any remedy for his loss. If he has, the court will construe the cesser clause in its fullest possible meaning, and say that the charterer is released, but if it finds that by so construing it the shipowner would be left without any remedy whatever for the breach, then it would say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach.

"The word 'demurrage,' no doubt, properly signifies

[1] See *Clink* v. *Radford & Co.* (*infra*).

the agreed additional payment (generally per day), for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charter-party containing the clause in question we must collect what is the proper meaning to be assigned to it." [Demurrage is an elastic word: it has a strict sense, but it can be stretched beyond its strict sense.] "When the charter-party contains no clause allowing demurrage at a specified rate at all, it has been held that the word 'demurrage' in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board."

In reference to the above-quoted passage, Bowen, L.J., in the case of *Clink* v. *Radford & Co.*,[1] said: "The word 'demurrage' therefore having two meanings, we must look at the charter-party to see if it is used in the strict sense, or in the more popular and elastic sense. We have also this that a lien is created, and, *prima facie*, a lien is only created as a convenient means of obtaining payment of a liquidated sum or of a sum that may be liquidated and ascertained; and though the parties by the contract may provide that the lien shall extend to an unliquidated sum, nevertheless there is a *prima facie* inconvenience in creating the lien to cover unliquidated damages for detention. So far as I know, all the cases, with the exception of *Bannister* v. *Breslauer*[2] (where a lien has been held to cover damages for detention of a ship), are cases

[1] [1891], *C.A.*, 1 *Q.B.*, at p. 631.
[2] *L.R.*, 2 *C.P.*, 497.

in which one can, either directly or indirectly, find in the charter-party some practical pecuniary measure by which the damages for such delay can be measured. If *Bannister* v. *Breslauer* (above) is to be supported at all, it must be upon the ground that no other meaning can be given to the word 'demurrage' in that charter-party, and no other extent to the lien to be created than by including in the word 'demurrage' damages for detention at the port of loading, so that such damages are covered by the lien."

Fry, L.J., in the same case, remarked: "The rule to apply . . . to the construction of a cesser clause, followed by a lien clause, appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charter-party the breach of which would create a legal liability; there would then be a cesser clause destroying that liability; and there would then come a lien clause which did not recreate that liability in anybody else. What would be the use of a stipulation if the moment it was created it was taken away, and was not laid upon someone else's shoulders? Such a construction would strike any one as being most unreasonable; and therefore it is not one which the court ought to adopt unless absolutely driven to it. We must, accordingly, read the two as co-extensive, if they can reasonably bear that interpretation." As pointed out by Amphlett, B., in *Kish* v. *Cory*,[1] "There are two ways, and two

[1] *L.R.*, 10 *Q.B.*, 553, at p. 563.

ways only, in which that injustice could be remedied : either to say 'the charterer's liability to cease' does not go beyond the freight and demurrage properly so called, which are subject to the lien, or to say, that demurrage, where mentioned in the lien clause, includes what may properly be called detention".

CHAPTER IV.

What expression "*per procuration*" in Charter-Party means —Ship fast on Mud-bank—Mere words of description attached to Name of Contractor—Charter-Party containing express and unequivocal Stipulation—When a Person does not relieve himself from Liability on a Contract—Sale of Goods on the assumption of dealing with a Principal—British Merchant buying for Foreigner—Case of *Deslandes* v. *Gregory*—The universal Rule where Person puts his Name to Bill of Exchange—Clause in Charter-Party, "It is this day mutually agreed between Messrs. ——, of ——, for Owners of the good ship R——"—Persons selling as Agents for an Owner—Evidence inadmissible to contradict Writing—The general principle of Law where a Person signs a written Contract—Case of *Cook* v. *Wilson* — Principal may secure benefit of Agent's Contract—Case of *Calder* v. *Dobell*—Plaintiff must disprove statement that Defendant was merely Agent.

THE expression "*per procuration*" in a charter-party simply means this: "I am an agent, not acting on any authority of my own in the case, but authorised by my principal to enter into this contract". Moreover, the word "procuration" gives due notice to the plaintiffs, and they are bound to ascertain before they take the bill that the acceptance is agreeable to the authority given. Undoubtedly, if persons profess to act as trustees and to convey an estate, the person who takes a conveyance from them is bound to

ascertain that they had the authority to convey it. But that sort of doctrine is not in the slightest degree applicable to a man carrying on a mercantile concern on behalf of another. It has been said that third persons are not bound to inquire into the making of a bill, but *that is not so* where the acceptance appears to be "*by procuration.*" If a man holds out by his conduct another person as his agent, by permitting that person to act in that character in all sorts of ways, and to appear to the world as a general agent, he is to be taken to be the general agent of the party for whom he acts, and who is bound by that general agency, though he may have in the particular instance gone beyond his authority.

Assuming that a ship has got fixed on a mud-bank, and the master has given notice that he is ready to discharge there, *it may be open to him to show* that it was the duty of the other party to take the cargo there, and if he can show that it was the other person's duty, the lay days have commenced. The state of the tide is a risk and ordinary delay which the shipowner undertakes to bear. Of course, in all tidal harbours a ship is liable to be delayed by the state of the tide. If such a misfortune happens, it is in the regular course of navigation.

It is important that mercantile men should understand that mere words of description attached to the name of a contractor saying he is agent for another do not limit his liability as contractor. A man, though agent, may very well intend to bind himself, and he does bind himself, if he contracts without restrictive words to show that he does not do so

personally. Moreover, if persons mean to exclude personal recourse against themselves on contracts which they sign, they must use restrictive words to express that they are not to be personally liable.

Where a charter-party contains an express and unequivocal stipulation that the shipper's liability "*in every respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as*" the cargo is shipped, such a clause cannot possibly be construed in any other way than as exempting the defendant from all liability after shipment of the cargo.

A man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description. Moreover, when a man signs a contract in his own name he is, *prima facie*, a contracting party and liable, and there must be something very strong on the face of the instrument to show that liability does not attach to him. When a signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it follows of necessity that that other person is the person liable; and this is undoubtedly one of the simplest possible cases. The usual way in which an agent contracts so as *not* to render himself personally liable is by *signing as agent*, and if it is clear from the body of the contract that he contracted only as agent he would save his liability.

It is the general rule that "if a person sells goods (*supposing at the time of the contract he is dealing with*

a principal) but afterwards discovers that the person with whom he has been dealing is *not* the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is *not* principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him, and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other."[1]

Where a British merchant is buying for a foreigner, according to the universal understanding of merchants and of all persons in trade, the credit is considered to be given to the British buyer and not to the foreigner. Again, where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable, but he *may* do so. It is undoubtedly true that the seller has his remedy against his principal rather than against any other person.

In a case decided in the year 1860, the charter-

[1] See *Thompson* v. *Davenport*, 2 *Sm. L.C.*, 368, and *Irvine* v. *Watson*, 5 *Q.B.D.*, 414.

party was made in London between plaintiff, ship-owner, and the defendants G——. Such charter-party was signed in the following manner: "As agents to —— of ——, merchants and charterers for D——" (plaintiff), "owner, H—— D——, as agent for ——, Esq., of G—— Brothers" (defendants), "as agents". It may be stated that the charter-party was partly written and partly printed, the words "merchants" and "charterers" being printed, and in the plural throughout the charter-party. It was decided that the form of the charter-party, and the mode of signature taken together, were decisive to show that the defendants did not bind themselves as principals, and were not personally liable on the contract.[1]

It is a universal rule that if a man puts his name to a bill of exchange he thereby makes himself *personally* liable, unless he states upon the face of the bill, etc., that he subscribes it *for* another, or by *procuration of another*, which are words of exclusion; unless he states plainly, "I am the mere scribe," he becomes liable.

The following clause was inserted in a charter-party: "It is this day mutually agreed between Messrs. —— of ——, for owners of the good ship R——". The defendants signed the charter-party at the foot as follows: "*For owners*, —— & Co.". It was held that there was evidence to show that the defendants were liable as principals in consequence of three letters (produced and read in the course of the case) which had passed between the plaintiffs

[1] See *Deslandes* v. *Gregory* [1860], 2 *El. & El.*, 602.

and the defendants, and that the charter-party was to be construed as explained by the letters.[1]

When persons are selling as agents for an owner, *in the absence of trade usage*, no liability attaches to them. In other words, if the name of the owner is not given in, or at the time of the making of, the contract, the buyer has the right to treat the broker as principal, and on such a custom, even if the owner's name were disclosed after the making of the contract, the buyer might sue either the principal or the broker. But such a custom is only required where there is a principal who could be charged, and the contract is made without disclosing his name. The signification of this custom is that where the principal's name is not disclosed in, or at the time the contract is made, the buyers reserve to themselves the right of suing the broker or factor. "When he" (the broker) "contracts in the ordinary form, describing and signing himself as broker and naming his principal, no action is maintainable by him." "When he states on the face of the contract that he is acting as broker, that is, as a middleman between the two parties, he has no interest, and cannot sue. If he could sue he could also be sued." Though, *prima facie*, in most cases the brokers are mere agents, yet if they fail to disclose the name of the principals *within a reasonable time* they (the agents) may, on the happening of this contingency, be principals. Evidence is *inadmissible* to contradict the writing; but in one sense the contract must always be varied

[1] See *Adams* v. *Hall*, 3 *Asp.*, 496.

by the admission of the evidence of *custom*, inasmuch as the effect of the contract would not be the same without the verbal evidence, or else the verbal evidence would be unnecessary. "The evidence of custom that is *inadmissible* must be evidence of something *inconsistent and irreconcilable* with the written contract."

The general principle of law is that if a man signs a written contract he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only.

An agreement for the carriage of goods from Liverpool to Australia was entered into as follows: "It is this day mutually agreed between ——, owners of the ship ——, of the first part, and ——, of the other part," that the ship should be ready by a given day to take on board certain specified goods, and should proceed therewith to ——, in the colony of ——, and there deliver the same, the rates of freight determined upon by *the said parties to this agreement* are as under, etc. "*One-third to be paid in London on receipt of bills of lading*, and the remainder by the —— Co. at ——, goods to be taken on board at Liverpool at ship's expense," and the agreement was signed J. & R. W., S. J. C. It was decided that S. J. C. was personally bound by this contract, and entitled to sue for a breach of it, and, further, that the court were bound to take notice that "——, in the colony of ——," is a place out of England. A declaration by S. J. C., after setting out the above contract in these words, averred that although the goods were in the care and custody of the defendants for the purpose

of their being taken on board, and the defendants took them on board at the ship's expense, yet, by their wrongful act, neglect and default, certain of them were damaged, etc. It was held that the declaration disclosed a breach of duty arising out of the contract, for which the defendants were liable to an action at the plaintiffs' suit.[1] Of course, a principal may come in and secure the benefit of a contract made by his agent, but this doctrine does not apply where the agent contracts as principal. "If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made;" and where a document itself represents that a person contracted as "owner," that doctrine applies.

In one case the defendant had authorised a broker to buy goods for him, telling him to keep his name out of the transaction. The broker bought of the plaintiffs, who refused to trust him, and required the principal's name, which was given; a written agreement was then entered into, in which only the broker's name appeared. The broker then sent the defendant a note saying that he had bought on the defendant's account; afterwards, on breach of the agreement, the plaintiffs communicated with the broker on the matter. It was held that though the defendant's name was known at the time of the contract in the broker's name, verbal evidence was admissible to show, and it was a question for the jury, whether or not the defend-

[1] See *Cook* v. *Wilson*, 1 *C.B.* (N.S.), 153.

ant was liable as principal, and whether or not the plaintiffs had made an election as against the broker.[1]

The plaintiff must *disprove* the statement that the defendant was merely agent by giving some evidence that he was principal. If there has been a third party who was the real freighter, such third party may be sued although his name does not appear in the charter-party.[2]

[1] See *Calder* v. *Dobell*, 40 *L.J.*, *C.P.*, 224.
[2] See *Schmaltz* v. *Avery*, 16 *Q.B.*, 655.

CHAPTER V.

Charterers who have Shipped Goods cannot Unship them—The term "*dead-freight*"—Shipowners bound by Maritime Law in case of Goods Shipped to duly carry them—Captain of Vessel no authority to bind Owners by Letters asking them to make Charter-Parties for them before Arrival—Question whether Ship's Husband has power to bind Owners by cancelling Charter-Party—The words "*now in the Port of Amsterdam*"—Examination of the term "*representation*"—Cases of *Bannerman* v. *White*, *Freeman* v. *Taylor*, *Dimech* v. *Corlett*, *Beyn* v. *Burgess*, where question was exhaustively discussed.

WHERE the charterers have shipped the goods, they have no right to require them to be unshipped. It is the captain's duty to retain them for the benefit of his owner by way of lien for the sum which would become due in respect of freight to be earned under the charter-party.

The term "*dead-freight*" has been used in a case[1] to denote a sum to be paid in respect of space not filled according to the charter-party.

The owners of a ship for whose benefit she is navigated are bound by the maritime law to owners of goods shipped and received on board to be carried for the due carriage of them, and are liable for any negligence on the part of themselves or their servants

[1] *Birley* v. *Gladstone*, 3 *M. & Seln.*, 205.

whereby the goods may be damaged. If, without fraud and in the due course of the ship's employment, the master makes a charter-party, the shipowners are not thereby divested of liability, but are still liable for the performance of such duties belonging to them in that character as are not inconsistent with the stipulations of the charter-party. And whether the charter-party be made under the seal of the master or not apparently makes no difference in this respect, because when the shipowners are not charged directly upon the contract of charter-party, but upon their general liability as principals in the adventure, they derive profit from the ship's employment for the performance of such duties as belong to them in that character and are not inconsistent with the charter-party.

No captain *before* arrival has any authority in law to bind his owners by letters asking them to make charter-parties before arrival. The authority of the captain to bind his owners by charter-party only arises when he is in a foreign port and his owners are not there, and there is difficulty in communicating with them. The system of a master writing forward to have his ship chartered might counteract the very orders of the owners, who had themselves written to the very same place. "If a captain in 1880, when at Grimbsy, thinking he will be there again in 1881, authorises —— to make a charter-party for him in 1881 before his ship arrived, that is contrary to business and law."

The question whether a ship's husband who has authority to bind the owners by effecting a charter-party has authority to bind them by cancelling it,

and paying a sum in lieu of commission where the arrangement is beneficial to the owners, may be answered by stating that a ship's husband has the authority of the ship's owners to procure a charter-party and to make contracts for their benefit, but there his authority ceases; and though it may be very desirable and expedient where the ship's husband is on the spot, and the owners are in a foreign country, and cannot be communicated with without loss of time, that the ship's husband should have power to cancel the charter-party on the best terms he can obtain, yet no such power exists. Moreover, he has no implied authority to cancel an existing one, neither has a ship's agent, notwithstanding that the charter-party gives it to him. A statement in a charter-party that a ship is of a particular class is a condition precedent.

The question whether in a charter-party the words that the ship is "*now in the port of Amsterdam*" is a representation or a warranty, using the latter word as synonymous with "condition," involves an examination of the nature of a representation. Strictly speaking, a representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. It should be noted that though it is sometimes contained in a written instrument it is not an integral part of the contract, and consequently the contract is not broken although the representation proves to be untrue, nor (with the exception of the case of policies of insurance —at all events, marine policies, which stand upon a

peculiar anomalous footing), is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth or by reason of its being made dishonestly, or with a reckless ignorance whether it was true or untrue. Where indeed a representation is so gross as to amount to sufficient evidence of fraud, it is quite obvious that the contract would on that ground be voidable. As has just been stated, although representations are not usually contained in the written instrument of contract, yet they sometimes are; but it is clear that their insertion in it cannot alter their nature. A question, however, may arise whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction, which the court and not the jury must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of the contract and not a mere representation, the often-discussed question may of course be raised whether this part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but can only be a cause of action for compensation in damages.

In the construction of charter-parties this question has been often raised with reference to stipulations that some future thing should be done or shall happen, and has given rise to many nice distinctions. As an illustration, a vessel to sail or be ready to receive a

cargo on or before a given day has been held to be a condition,[1] while a stipulation that the ship shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.[2] But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident of it, the true doctrine established by principle, as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more accurately, perhaps ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages.[3] Accordingly, if a specific thing has been sold with a warranty of its quality under such circumstances that the property passes by the sale, the purchaser, having been thus benefited by the partial execution of the contract

[1] See *Oliver* v. *Fielden*, 4 *Ex. Rep.*, 135; *Seeger* v. *Duthie*, 8 *C.B.* (N.S.), 45.

[2] See *Tarrabochia* v. *Hickie*, 26 *L.J. Rep.* (N.S.), *Ex.* 26, and *Clipsham* v. *Vertue*, 13 *L.J. Rep.* (N.S.), *Q.B.*, 2.

[3] See *Ellen* v. *Topp*, 6 *Ex. Rep.*, 424.

and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken unless there is a special stipulation to that effect in the contract,[1] but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is *not* specific, and the property has *not* passed by the sale, the purchaser may refuse to receive the thing proffered to him in the performance of the contract on the ground that it does not correspond with the descriptive statement; or, in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing sold and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for the breach of which he may bring an action to recover damages.

"It is plain that the court must be influenced in the construction not only by the language of the instrument, but also by the circumstances under which, and the purposes for which, the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance that a statement of it in the charter-party might properly be regarded as part of the ship-owner's contract, and so amounting to a warranty. Whereas the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So, if it were shown that the charter-party was made for a purpose, such that unless the vessel began her voyage from the

[1] See *Bannerman* v. *White*, 10 *C.B.* (N.S.), 844.

port of loading with a cargo on board by a certain time, it was manifest that the object of the charter-party was made for a purpose, such that, unless, the vessel began her voyage from the port of loading with a cargo on board by a certain time, it was manifest that the object of the charter-party would in all probability be frustrated, the court might properly be led by these circumstances to conclude that a statement as to the locality of the ship, coupled with the stipulation that she should sail with all convenient speed, was a warranty of her then locality."

In some of the cases it is true, in which the question has been whether a stipulation in a charter-party amounted to a condition, the court decided that question in the negative, and took occasion to suggest that neglect or delay on the part of the shipowner to execute his part of the contract might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform his part of it; and, further, suggested that in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the court might advert to the fact whether such breach had frustrated the material object which the charterer had in view.[1] "But the court did not, we apprehend, mean to intimate that the frustration of the voyage would convert a stipulation into a condition if it were not originally intended to be one."

[1] See *Freeman* v. *Taylor*, 8 *Bing.*, 124, and *Dimech* v. *Corlett*, 12 *Moo. P.C.C.*, 199.

"Now, the place of the ship at the date of the contract, when the ship is in foreign parts and is chartered to come to England, may be the only *datum* on which the charterer can found his calculations of the time of the ship arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For in most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In the ordinary course of charters, in general, it would be so. . . . Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend. If it was a condition, and not performed, it follows that the obligation of the charterer dependent thereon ceased at his option, and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. Such was the decision of *Gladholm* v. *Hays*,[1] where the stipulation in the charter of the ship to load at Trieste was that she should sail from England on or before the 4th February ('to sail on or before the 4th of February'), and the non-performance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the non-perform-

[1] 2 *Man. & G.*, 257.

ance. So in *Olive* v. *Booker*,[1] the statement in the charter of a ship which was to load at Marseilles was that she 'was now at sea, having sailed three weeks ago,' and it was held to be a condition for the reasons above stated." [See judgments and *not* marginal note in *Olive* v. *Booker*. This decision governs the decision in *Beyn* v. *Burgess*, 32 *L.J.*, *Q.B.*, 204.] "And we are further of opinion that in so holding we do not at all conflict with the decision in the case of *Dimech* v. *Corlett* as above explained."[2] Where a representation is contained in a charter-party, it is a *condition precedent* or not according to this, whether it does or does not enter into and affect the substance of the contemplated voyage.

[1] 1 *Ex. Rep.*, 416.

[2] Per judgment in *Beyn* v. *Burgess* (*ante*).

CHAPTER VI.

Clause in Charter-Party, "Charterer has option of Shipping 100-200 tons of General Cargo"—Clause in Charter-Party, "*Ready to receive Cargo in all May*"—What the Authorities show in reference to Restraint of Princes—Question whether Plaintiff can maintain Action against Charterers for not Loading—Case of *Geipel* v. *Smith*—Where there is no express Agreement as to Time in Charter-Party—In Charter for stipulated Time, Time the Essence of the Contract—Whether particular Covenant constitutes a Condition Precedent—Question whether Plaintiff has undertaken to keep Vessel "Tight," etc.—Question whether Defendant has any Right to Deduct any Time in making good Defects—Loss of Freight by exercise of Power of Mulct or Abatement reserved in Charter-Party—Stipulations "In a Reasonable Time," "With all Convenient Speed," in Charter-Party—The words "Now Sailed, or about to Sail"—If a Ship's Tonnage amounts to a *guarantee*—Excepted Peril Clauses in a Charter-Party.

THE following clauses were contained in a charter-party, "Charterer has option of shipping 100-200 tons of general cargo," and "Owners guarantee ship to carry at least about 90,000 cubic feet, or 1,500 tons deadweight of cargo". It was held that the latter clause did not amount to a warranty that the ship should be able to carry about 90,000 cubic feet of the description of cargo which the charterer was, under the previous clauses, entitled to render, but

was merely a warranty of the carrying capacity of the ship.[1]

Unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.

A supercargo, unless his authority be expressly or impliedly restrained, must from the nature of his employment be invested with a complete control over the cargo and everything which immediately concerns it or that must concern its destination; and, therefore, unless the general power of the supercargo was restrained from varying the voyage within the limits agreed in the charter-party, he must be taken to have it. From the nature of the appointment of a supercargo, where he is on board the ship and the freighter is absent, it follows that he should have the same power in this respect as the freighter himself; for he is to take advantage of every circumstance as it arises, to act for the benefit of his employer in the adventure; but if the charter-party had been made for a certain voyage, that would be a very different consideration. His power depends very much upon the nature of the voyage.

In one charter-party the vessel was described as "*ready to receive cargo in all May*," and it was held that the readiness to receive a cargo in all May was a condition precedent to the plaintiff's right to re-

[1] See *Carnegie* v. *Connor*, 24 *Q.B.D.*, 45.

cover for not loading a full cargo, that statement not being a mere description but part of the contract.[1]

Apparently, the authorities show that in the event of a restraint of princes the obligation of a shipowner (in the absence of any special provision) is to wait a reasonable time for the purpose of ascertaining whether the restraint is likely to be of such a duration as to render it impossible commercially to carry out "the contract," and the question of what is a reasonable time must depend upon the circumstances of each particular case.

The question whether the plaintiff can maintain an action against the charterers for not loading: if a definite voyage has been contracted for, and had become impossible by perils of the seas, that voyage would have been prevented, and the freight to be earned by it would have been lost by the perils of the seas may thus be answered. "The power which undoubtedly exists to perform, say, an autumn voyage in lieu of a spring voyage, if *both parties were willing*, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo." Assuming that there is no time named for the doing of anything, the law attaches a reasonable time.

In the case of *Geipel* v. *Smith*[2] the shipowner was excused not merely for refusing to take a cargo to a port which became blockaded after the charter,

[1] See *Oliver* v. *Fielden*, 4 *Ex.*, 135.

[2] *L.R.*, 7 *Q.B.*, 404.

but also in effect for refusing to do so after the blockade was removed. Restraint of princes not only excused but discharged him, and no doubt the same would have been held with regard to the charterers. Moreover, there are cases which hold that where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged.[1] And the reason for this is not merely because the contract is broken, for if it is not a condition precedent it does not matter whether it is unperformed with or without excuse, and not arriving with due diligence or at a day named is the subject of a cross action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies.[2] "In the case of goods carried part of the voyage, and the ship lost but the goods saved, the shipowner may carry them on if he chooses, but he is not bound to do so. Suppose he does not, his freight is lost; so also if he does not choose to repair a vessel which remains *in specie* but is a constructive total loss."

"Upon general principles in all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage; and, after it has commenced, no deviation." That is to say, in all contracts by charter-party expedition is of importance, for by delay the whole

[1] See *Freeman* v. *Taylor* (*ante*).
[2] See *Taylor* v. *Caldwell*, 3 *B. & S.*, 826.

object of the voyage may be defeated. The intention of the parties must be looked to with reference to the trade in which they are engaged. In a word, "he who enters into a contract is bound to perform it within a reasonable time unless there be provision to the contrary".

In a charter for a stipulated time, the time is of the essence of the contract, and the charterer is *not* bound to take the vessel for a time *substantially different* from the time specified in the charter; and the charterer, if he could not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, and this applies also in a charter for time; if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time or a substantially different time, and if he cannot get the vessel for the specified time, he may throw up the charter. "In all contracts which are to be mutually performed, the party who claims performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which was contracted to be given. If there is an agreement to sell 100 quarters of wheat, the purchaser is not bound to accept 90 quarters, though the price of wheat has fallen, and it is for his advantage to have the smaller quantity. He can say 'I never agreed to buy a quantity of 90 quarters, and therefore I will not take them'." And this applies also in the case of a charter-party. The plaintiff can say, "I never agreed to charter the —— from the —— day of ——, 1900, to the —— day of ——, 1901, and there-

fore I will not take her for that period". It has never been held that a charterer who has chartered a vessel for twelve months is bound to accept the use of the vessel for a substantially different period.[1]

Generally speaking, freight is not payable until the goods have been delivered at the port of destination. There is no difference between the words "*final* sailing of the vessel from the port of loading" and "the *final* sailing of the ship".

Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained. A covenant to sail with the first wind is not a condition precedent. It is the general rule, where mutual covenants go to the whole consideration on both sides, that they are mutual conditions—the one precedent to the other; but where they go only to a part, and a breach may be paid for in damages, there the defendant has a remedy on the covenant, and cannot plead it as a condition precedent.

The question whether, because the plaintiff has undertaken to keep the vessel "tight," the defendant has a right to deduct anything out of the freight they are to pay in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel has been hired, may be answered in the negative. When the defendants were making their bargain, they should stipulate to deduct for the time which might be exhausted in making those repairs, if they meant to make that

[1] See *Tully* v. *Howling*, 2 *Q.B.D.*, 182.

deduction. Without such a stipulation the true construction of the charter-party is that, whilst those repairs are going on, the ship is to be considered as in the defendant's service, and the defendants will be liable to continue their payments.

The question whether a loss of freight by the exercise of a power of mulct or abatement *reserved by charter-party to the charterers*, and which power was exercised by reason of the ship being temporarily rendered inefficient for the service on which she was engaged by perils insured against, is a loss for which the insurers are liable under an ordinary time policy "on freight outstanding," has been decided by the House of Lords in the negative.[1]

If a ship is described as a steamer, it may be a condition precedent when time, as it usually is, is the essence of the contract; so also may a ship's nationality. The charterer must *name* a port of loading. Where he does not do so, the shipowner may be justified in not carrying out his contract. In reference to this it may also be noted that the ship *must be in existence;* the contract is at an end if she is not.

The stipulations, "*in a reasonable time*," "*with all convenient speed*," have been held to be *not conditions precedent;* "to sail forthwith" in a charter-party is enough if the ship sails within a reasonable time. An agreement to pay a fixed sum for delay may only entitle the charterer to *ascertained* damages for any delay; he cannot break the contract.[2] The charterer may waive a breach of a condition pre-

[1] See *Inman Steamship Co.* v. *Bischoff*, 7 *App. Cas.*, 670.

[2] See *Valente* v. *Gibbs* [1859], 28 *L.J.C.P.*, 229.

cedent, and if he does so he cannot afterwards take advantage of it.

In a late case the question was whether the words "*now sailed or about to sail*" constituted a condition precedent to the defendant's obligation to load the ship, and whether that condition had been broken. That was a question as to the true construction of a written document, namely, the charter-party, and therefore, was for the court to decide. The question was whether the words "*now sailed or about to sail*" constituted a mere representation or a contract; and if the latter, whether they constituted a warranty or a condition precedent. The Master of the Rolls (Lord Esher) said: "In order to construe those words, the Court must know the facts with reference to which those words were used. Both parties knew that the ship was then at —— loading a cargo; both parties thought that she was loaded and would almost immediately sail. Under these circumstances, the words '*about to sail*' meant about to sail almost immediately. The words were not a mere representation, but were inserted for a well-known purpose, and were most material to carry out the intention of the parties, and were a part of the contract." . . . "But, if they desired to put an end to the contract, they must exercise their right so as not, by their conduct, to leave the plaintiff under the impression that he was still bound to carry out the contract.[1]

A statement of a ship's tonnage, if it amount to a *guarantee* by the shipowner of his vessel's carrying

[1] See *Bentzen* v. *Taylor, Sons & Co.*, 9 *Times' L.R.*, 552.

power, with reference to the proposed voyage and cargo, so far as that description is known to him, constitutes a warranty, so also does a statement of the amount of water which the vessel draws.

The excepted peril clauses in a charter-party are only "*for the benefit of the master and not of the freighter*," unless otherwise extended to the charterers and shipowners, *e.g.*, "mutually excepted".[1] The usual exceptions in a charter-party, "*act of God, perils of the sea*," etc., are for the protection of the charterers as well as the shipowners.[2]

[1] See *Bruce* v. *Nicolopulo*, 11 *Ex.*, 129.
[2] See *Barrie* v. *Peruvian Corporation* [1896], 2 *Com. Cas.*, 50.

CHAPTER VII.

Charter-Party may be Broken wholly or partially—Cases where there has been undue Delay—Under ordinary Charter of a Ship, Shipowner bound to provide necessary Ballast for safe Navigation—Question whether Charter-Party constitutes the Demise of the Ship—Term "Freight" whether used in case of advanced Freight or otherwise always has same Meaning—Cases of *Watson* v. *Borner & Co.*, *Macbeth* v. *Wild & Co.*, *Lyle Shipping Co.* v. *Cardiff Corporation*—When Charterer has fulfilled his Contract—When it has been agreed that "Demurrage" shall commence—Cases of *Dobell* v. *Green*, *Brenda Steamship Co.* v. *Green*—Whether there has been a Breach of Duty, a Question of Fact—Right of Stoppage *in transitu*—Sub-section 5 of Section 45 of Sale of Goods Act, 1893.

A CHARTER-PARTY may be broken wholly or partially by the act of a party to it—*wholly*, as by the breach of a condition precedent; *partially*, by the breach of a simple independent stipulation. The contract may be dissolved by its being impossible of performance, or on account of its illegality. Where the charterer does not load a cargo, the master must get other goods in its place.[1] There is no positive rule of law as to the amount of damages. In estimating damages the defendants cannot take into account the amount which the plaintiff has received from an accidental

[1] See 14 *Appeal Cases*, 519.

insurance policy. Moreover, the benefit cannot be deducted from the damages for which the defendants are liable.

In all cases where there has been *undue* delay, causing loss of weight of cargo (in sugar, for example), and loss of interest in its value, the charterer is entitled to recover damages. In estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well.[1] If the whole sum has been advanced and insured, persons who have bought from the charterers can recover as part of the damages the amount of the advanced freight for the benefit of their underwriters (s.c.).

"Under an ordinary charter of a ship, the shipowner is bound to provide the necessary ballast for his ship; the reason being that, as he is responsible for the navigation of the ship by his captain, he is responsible for the ballast necessary to enable his ship to perform the contemplated voyage. Mr. Carrer well points out, in his work on *Carriage by Sea*, p. 262, that not only is it the duty of the shipowner, but it is his privilege to ballast his ship, for he is entitled to carry merchandise as ballast bearing freight provided it occupies no larger space than the ordinary ballast would do, and leaves to the charterer the full space of the vessel proper to be filled with his cargo." It has recently been laid down by the House of Lords that upon the true construction of a charter-party the ordinary application of supplying such ballast as is

[1] See *Rodocanachi* v. *Milburn* [1886], 18 *Q.B.D.*, 77.

necessary for the safe navigation of the ship, rests with the shipowners.[1]

Let us assume that a question arises whether a charter-party constitutes a demise of a ship or not. The ordinary test is, whose servants are those who are to navigate the ship? If the shipowner's servants, then they act as carriers of the cargo for the charterers, but if they are the servants of the charterers, the shipowners generally cease to be carriers, and the contract is one of hiring. In the former case, there is no demise of the ship; in the latter, there may be. Unless there are clauses in the charter which show that the shipowners are to be exempt from the obligation to put sand as well as water ballast on board, and where the charter does not constitute a demise of the ship, the shipowners are clearly liable. To put it shortly, "if a shipowner is to be relieved from the obligation of ballasting his ship, the charter-party not constituting a demise of the ship, there must be a clause to that effect inserted in the charter-party". "It is clear law, and is admitted on all hands, that in the case of ordinary charter-parties the obligation to provide ballast lies on the owner of the ship."

It was argued in a late case by counsel for the shipowners that the rule applicable to time charters differs from that which applies to voyage-charters; however, *it is not so*, unless the charter is not a contract of carriage but one for the *hire* of the ship, amounting to a complete demise of her, which relieves the shipowner and his captain from

[1] See *Weir* v. *Girvin* [1899], 28 (affirming Court of Appeal), House of Lords' judgment delivered 23rd July, 1900.

the duty of managing the ship and places it on the *hirer*.[1]

The term "freight," whether used in respect of advanced freight or otherwise, always has the same meaning. It may be stipulated that it shall be payable on delivery of the goods, or that a part shall be payable in advance, but every payment is a payment of the same freight. Moreover, it is plainly within the competence of the parties to a charter-party to make stipulations regulating the payment of each part of the freight, and, apparently, they constantly agree that the payment of that part which is payable in advance shall be independent of the delivery of the goods or the performance of the voyage.[2]

The case of *Watson* v. *Borner & Co.* (reported in vol. xvi. of the *Times' Law Reports*, 1900, and decided by the Court of Appeal on 24th July, 1900), was an appeal from the judgment of Mathew, J., and the action was brought by the owners of the steamship *Netley Abbey* to recover a balance of freight upon a cargo of ore carried from Elba to Cardiff under a charter-party dated 15th January, 1898, made between the plaintiff and defendants. The principal question in the case was whether the defendants were entitled to deduct from the amount of freight payable on the cargo the sum of £100 5s. in respect of despatch money alleged to have been earned by them, or only £49 5s. The charter-party provided that the *Netley Abbey* should "*proceed to Elba and there*

[1] See *Weir* v. *Girvin, C.A.* [1899], 28 (*sup.*).

[2] See *Allison* v. *Bristol Marine Insurance Co.*, 1 *App. Cas.*, 209.

load a cargo of ore, and being so loaded should proceed to Dowlais Wharf, Cardiff, and there deliver the same as customary according to the custom of the port, where and as directed by consignees, to whom notice is to be given of the vessel being ready to discharge". The cargo to be shipped was at the rate of 200 tons per working day of twenty-four hours, and was to be discharged on the same conditions. Time for discharging to count "*from* 6 A.M. *after ship is in every respect ready in berth and in free pratique as per custom of port*, written notice of such readiness being given to consignees during usual office hours. . . . Demurrage, if any, at the rate of twenty shillings sterling per hour. Despatch money at the rate of half the demurrage." The Dowlais Wharf was a private wharf belonging to the Dowlais Iron Company, and was situated in the Roath Wharf, Cardiff. The wharf was under the entire control of the Dowlais Company, who directed the order in which vessels were to load or discharge at their wharf. The cargo in question formed part of a large quantity of ore which had been sold by the defendants to the Dowlais Company under a contract made in 1897, by which the Dowlais Company were bound to take delivery *ex* ship in the Roath Dock, Cardiff. The contract provided that "the cargo should be discharged at the rate of not less than 300 tons per working day from time ship is ready to discharge, or buyers to pay demurrage as per charter-party". A bill of lading was signed for the cargo, and was indorsed by the defendants, and sent to the Dowlais Company, who discharged the vessel and paid freight on the cargo to the shipowners, the amount being

settled in account with the defendants. At the Dowlais Wharf there were facilities for loading or discharging three vessels at a time. The *Netley Abbey* arrived in the Roath Dock on 8th February, 1898, and notice of readiness to discharge was given to the Dowlais Company on that day. There were at the time three vessels at the Dowlais Wharf, one of which left early on the following day, and another vessel called the *Onyx*, which arrived in dock after the *Netley Abbey*, was, in order to suit the business arrangements of the Dowlais Company, put into her place to load. The *Onyx* was succeeded by another vessel, which also loaded cargo from the Dowlais Company. The *Netley Abbey* got into berth at 2 P.M. on 14th February, and her discharge was completed at 6 A.M. on the 17th. The time allowed by a charter-party for unloading was 248½ hours. The defendants contended that loading time commenced at 6 A.M. on 15th February, and that 200½ hours had been saved. The plaintiffs' case was that the *Netley Abbey* had been prevented from getting into berth on the 9th by the act of the Dowlais Company, who were the defendants' agents, and that in consequence, therefore, the defendants were not entitled to the despatch money. Mr. Justice Mathew gave judgment for the defendants.

In giving judgment in the Court of Appeal, the Lord Chancellor said that in his opinion the judgment was right. The case was perfectly clear. The obligation was upon the shipowners to take their ship to Dowlais Wharf. They did not do so until 14th February, and therefore the lay days did not

commence to run until 6 A.M. on 15th February. The other Lord Justices concurred.

The case of *The Lyle Shipping Company* v. *The Corporation of Cardiff*, decided in the Court of Appeal, on 2nd August, 1900, was an action brought to recover damages for the detention of the plaintiffs' ship, *Cape Wrath*, during the discharge of a cargo of jarrah wood at Cardiff. It was originally tried before Mr. Justice Bigham without a jury, who gave judgment for the defendants. The defendants were sued as indorsers of the bills of lading, who had taken delivery of the cargo. The charter-party, which was incorporated in the bills of lading, contained the following clause: "*The ship to be discharged with all despatch as customary, weather permitting*". There was in fact considerable delay in the discharge at Cardiff owing to an insufficient supply of railway waggons alongside the ship. Lord Justice Smith, the other Lord Justices concurring, dismissed the appeal, and said the principle to be applied to the present case were the words of Lord Herschell in *Hick & Raymond* v. *Reid* (1893), *A.C.*, 22, who said that "the only sound principle is that the *reasonable time* should depend on the circumstances, which actually exist. If the cargo has been taken with all reasonable despatch, under those circumstances, I think the obligation of the consignee has been fulfilled. When I say *the circumstances which actually exist*, I, of course, imply that those circumstances, in so far as they involve delay, *have not been caused or contributed to by the consignee*."

A late decision on the subject of charter-parties is

that of *Macbeth* v. *Wild & Co.*[1] It lays down that as a rule lay days begin to count as soon as the ship is ready to deliver at the agreed discharging berth, but the parties may stipulate differently if they choose. The charter-party in this case provided in express terms that the lay days were to commence "when the steamer is reported at the Custom House, and is in free *pratique* at the port of Middlesborough". At noon on 7th February the steamer was reported and in free *pratique*. The lay days therefore began to run from that time. "When the vessel gets to the designated discharging berth the notice must be given, and if it is not given, and time is thereby lost, the shipowner will be liable in damages; but the omission to give the notice will not prevent the running of the lay days which have already commenced. . . . The lay days at the loading port are to begin to run when the ship is reported at the Custom House and in free *pratique*, and apparently they may begin sooner if the loading berth is not named immediately on the vessel's arrival."

Messrs. —— (shipowners) brought an action against Messrs. —— (charterers) for not loading a full and complete cargo of wet wood-pulp. It appeared from the charter-party that the contemplated loading was to be in midwinter, at which time, as the evidence proved, wet wood-pulp arrived at the port of loading, and was loaded in a frozen condition. In this state it would not stow so closely as when unfrozen, and

[1] 16 *Times' L.R.*, 497 [Judgment delivered, 9th July, 1900].

as a matter of course a lesser amount could be loaded than if the pulp had been in a normal condition. Two of the judges of the Court of Appeal[1] held that the charterers in loading as much wet-pulp in a frozen condition as the ship would carry had performed their obligation to load a full and complete cargo. The third judge[2] held that to relieve the charterers from liability it was not enough to show that wet wood-pulp was habitually loaded in winter in a frozen condition, but it must also be proved that cargoes so loaded were accepted as full and complete cargoes, and that as there was no evidence of such a custom the defendants were liable.[3]

A charterer in a contract by charter-party undertook to load a cargo of ore, say about 2,800 tons. The actual capacity of the ship was 2,880 tons, and the charterer loaded 2,840 tons, it was decided that the charterer had fulfilled his contract.[4]

In all charter-parties where it has been agreed that demurrage shall commence where there is any default of the charterers in failing to provide a quay berth at the port of loading, the obligation to pay demurrage continues in the absence of any default of the shipowner until the completion of the loading. "When once the shipowners were in a position to say, 'Our vessel is on demurrage, and you are bound under the charter-party to pay us —— an hour,'

[1] Lord Justices A. L. Smith and Rigby.

[2] Williams, L.J.

[3] See *Steamship Isis Co.* v. *Bahr*, 2 *Q.B.*, *C.A.* [1899], 364 (affirmed House of Lords, 1900), *W.N.*, 112.

[4] See *Miller* v. *Borner & Co.*, *Div. Ct.* [1900], 1 *Q.B.*, 691.

from that time, unless some default could be attributed to the shipowners, the demurrage obligation was enforceable against the charterers." [1]

On January, 1898, the defendants, Messrs. ——, of London, chartered the plaintiff's ship, ——, to carry a cargo of South Wales coal from Cardiff to Iquique. The vessel was at the time homeward bound to Liverpool, and was not expected to arrive at that port before April or May. The charter-party provided that after discharging her inward cargo at Liverpool the vessel "shall sail to Cardiff, and shall proceed to such loading berth as the freighters shall name, and shall there load a cargo of steam coal as ordered by the charterers, which they bind themselves to ship (except in the event of (*inter alia*) strike of shippers, pitmen); the vessel to be loaded as customary, but subject in all respects to the colliery guarantee in —— Colliery; working days as may be arranged, any claim for demurrage in loading to be settled with the colliery direct". The charterers, for the purpose of fulfilling their obligation under the charter-party, tendered to the shipowners the guaranty of that colliery, under which the colliery proprietors undertook to load the ship in twenty days, after she should be ready to receive cargo, subject to the usual exception as to strikes. The shipowners objected to the colliery guarantee as not being in accordance with the charter, on the ground that the colliery was then on strike. The strike still continuing for three months after the arrival of the

[1] See *Tyne and Blythe Shipping Co.* v. *Leech, Harrison & Forwood* [1900], 2 *Q.B.*, 14, 16.

ship at Cardiff, her loading was, in consequence, delayed for that period. Steam coal might have been obtained from other collieries in the district which remained working during the strike, although at a very high price. The shipowners brought action against the charterers for damages for detaining the ship. It was decided, however, that the shipowners were not entitled to object to the colliery guarantee, as not being in accordance with the terms of the charter-party, and the action could not be maintained.[1]

The ordinary rule is that "apart from custom a ship has delivered her cargo when it is put over the rail, . . . and that is a joint operation of ship-owner and charterer". Where, therefore, the terms of a charter-party are to the effect that the cargo is to be brought to ——, that is, at the loading port ——, and taken from ——, that is, at the discharging port ——, alongside at charterers' risk and expense, "*any custom of the port notwithstanding*," the meaning of this is plainly that the clause of the charter-party is to be read irrespectively of any custom, and the concluding words cover the whole preceding clause, and if so, the duty of the charterers is to take the cargo from alongside ——, that is, when it is offered to them over the ship's rail. Cases which arise as to the circumstances in which a custom is applicable have no bearing on a case in which the custom has been eliminated by the terms of the charter-party. To use other words, "When it is conceded that, apart from custom, taking delivery alongside means

[1] See *Dobell* v. *Green* [1900], 1 *Q.B.*, 526.

taking delivery over the ship's rail, the obligation on the shipowner cannot be extended without importing a custom of the port of discharge. If such a custom is excluded . . . the ordinary meaning of the words 'deliver' and 'alongside' must be adopted."[1]

Whether there has been a breach of duty is a question of fact. The proper answer to this question "must be determined by the circumstances of each particular case, and the question whether active special measures ought to have been taken to preserve the cargo from growing damage by accident is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the matter may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call for purposes connected with the voyage, though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril—in short, all

[1] See *Brenda Steamship Co.* v. *Greer*, at p. 520 of 1 *Q.B., C.A.* [1900], 520.

circumstances affecting risk, trouble, delay and inconvenience—must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty."[1] [These observations were applied in the case of the *Savona*.[2]]

In reference to the charter-parties and the right to stop goods *in transitu*, the provision of the sub-section 5 of section 45 of the Sale of Goods Act, 1893, may be quoted: "Where goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer".

In the case of *Fraser and White* v. *Bee*,[3] the facts were these: Fraser and White were the charterers and the defendant, Bee, was the owner of the *Sir Bevis*, a steamship of 1200 tons dead-weight capacity. The charter-party was dated 24th February, 1899, and was for a specified period of twenty-five years. The ship was to be employed between safe ports of the continent of Europe. The terms of the charter-party were that the charterers (the plaintiffs) were to pay for, *inter alia*, pilotages, and in the event of loss of time from damage, preventing the working of the vessel, the payment of hire should cease until the vessel should be again in an efficient state to resume

[1] Per Willes, J., in *Notara* v. *Henderson* [1872], *L.R.*, 7 *Q.B.*, 225, at p. 237.

[2] [1900], *W.N.*, p. 124.

[3] 17 *T.L.R.*, 101.

her services; and the negligence of the pilot, master, mariners or other servants of the owner was mutually excepted. The ship, while under the charge of a pilot, grounded in getting to her berth in a harbour, and in consequence she was prevented from working for a time. The berth was a safe berth and the grounding was due to the pilot's negligence.

In giving judgment, Mr. Justice Mathew said that he came to the conclusion that the berth was a safe one, and that the action was due to the act of the pilot, and that he alone was responsible; and that the fact that the charterers had to pay the pilot did not make him their servant, and he had no authority to involve them in liability. The learned judge decided, therefore, that the charterers were not bound to pay for the hire of the ship during the time that she was prevented from working.

Under a charter-party a vessel had to load a full and complete cargo. It was held that that meant as much as she could reasonably store and carry. In that case the cargo was to consist of bright deals and battens, "with the necessary ends, nine feet and under, as required by captain for broken stowage only". The port of discharge was London. The freight was £2 12s. 6d. for deals and battens and two-thirds freight for "ends," but "not over five standards nine feet at two-thirds freight". The action was brought to recover a balance of freight, also dead freight and demurrage both at the port of loading (Three Rivers Canada) and at the port of discharge (London). The defendants admitted that a balance of freight was due, but claimed to be allowed to deduct a discount of 2 per

cent. under the provisions of the charter-party. Subject to this discount the defendants consented to the plaintiffs being paid freight out of a sum in the hands of the Surry Commercial Docks Company.

The plaintiff alleged as to the dead freight that the defendants had failed to supply the broken ends as required by the captain for broken stowage, whereby the vessel carried thirteen standards less than she should have done.

Mr. Justice Kennedy in the course of his judgment said that the fair meaning of the charter-party, quite apart from any customary meaning, was that the master was not entitled to dictate to the merchant as to the quantity of any particular "ends" he might require. The master could not upset the merchant's arrangements, and insist on his peculiar requirements being acted upon. Conversely, the merchant was not entitled to send "ends" which were all of nine feet, unless he was willing to pay full freight on all such "ends" after five standards had been supplied. In reference to the claim for demurrage at the port of loading, the delay was due to two causes. First, the captain objected to a part of the cargo being loaded because it was "sun coloured"; he thought, wrongly, that timber in that condition was not "dry" or "bright"; but "dry" and "bright" meant "not floated," and these deals had not been floated. The captain's mistake caused some delay, but this could not be charged to the defendants. Another cause of the delay was, the unwarrantable contention of the captain that he must have the cargo of special lengths. Further, in Mr. Justice Kennedy's opinion, the captain

had not given the lighters proper despatch. On this part of the case the plaintiff's case failed. With regard to the claim for demurrage at the port of discharge, the learned judge held that the plaintiff was to some extent entitled to succeed, because the defendants had required the separation of a part of the cargo which the plaintiff was not bound to do for them. Some delay was necessarily caused by this, and there was also some delay in stating the discharge. The learned judge allowed three days demurrage at the port of discharge. As to the claim for freight he held that the action was brought prematurely. The words used in the charter-party were "freight payable on right and final delivery of the cargo". That meant after the amount due had been ascertained; but the action had been commenced before that had been done. The defendants had, however, delayed paying the freight for an unreasonable time, and, therefore, they were not entitled to the deduction of discount. He gave judgment for the plaintiff for £79 with costs, except as to the claim for freight, and the plaintiff would have to pay to the defendants all costs due for dead freight and demurrage at the port of loading.[1]

In the case of *Steel, Young & Co.* v. *Grand Canary Coaling Company*,[2] the charter-party provided *inter alia* that any time lost through strikes was not to be computed as part of the loading time, and if there was any stoppage from strikes lasting for six running days from the time of the vessel being ready to load, the charter should become null and

[1] See *Olsen* v. *Dobell & Co.*, 17 *T.L.R.*, 245.
[2] 17 *T.L.R.*, 652.

void, provided that no cargo was shipped on board prior to such stoppage. It was decided by Phillimore, J., that this clause came into force only when there was a stoppage from a strike existing when the time for loading arrived and continuing for six days, and he gave judgment for the plaintiffs. This decision was appealed against (see 18 T.L.R., 719), and the Court of Appeal, consisting of Collins (M.R.), Mathew and Cozens-Hardy, L.JJ., were unanimously of opinion that the charter-party contemplated the possibility of an interval occurring before the stoppage during which no loading might have taken place, and that the defendants had not committed any breach of the charter-party but had rightly taken advantage of a clause in the charter-party which had been inserted for their benefit entitling them to an extended time for loading at their own expense and that the defendants had paid into court all that the plaintiffs were entitled to. Mr. Justice Phillimore was reversed and the appeal allowed.

In the case *The West Hartlepool Steam Navigation Company* v. *Tagart, Beaton & Co.*,[1] the question was whether the plaintiffs had, as against the defendants, a lien on 133 pieces of timber for the hire money owing to the plaintiffs under a time charter. Mr. Justice Walton said that that question, of course, had primarily to depend upon the terms of the charter-party. By the terms of the charter-party the charterers were allowed to make use of the ship either for the carriage of their own goods or those of other shippers, and that with regard to this

[1] 18 *T.L.R.*, 359.

employment and in signing bills of lading for the purpose of this employment, the captain, though, in fact, the servant of the shipowners, was authorised by them, and, indeed, bound by the terms of the charter-party, and act as if he was the servant of the charterers, and obey their directions. The defendants accepted a bill of lading under which by its terms there was no lien for freight, and as the captain had express authority from the plaintiffs to sign such bill of lading, he (the learned judge) held that there was no lien for chartered freight as against the defendants in respect of the 133 pieces of timber. This decision was reversed on appeal. The Court of Appeal, composed of the Lord Chancellor (Lord Halsbury), the Lord Chief Justice (Lord Alverstone) and Sir Francis Jeune (President of the Probate Divorce and Admiralty Division), were unanimously of opinion that Mr. Justice Walton was wrong.

The Lord Chancellor, in giving judgment, said that whatever might be the rights of third parties—real parties, not two people representing one party—he was clearly of opinion that, where the shipowners had a lien attaching to goods on shipment, and the goods shipped belonged to the charterer himself, the lien attached from that moment. They were dealing here with the charterers loading their own goods, and how in these circumstances the shipowners' lien was to be got rid of he could not imagine. The shipowners had never been divested of their lien, the goods being in their hands either actually or constructively from the time when the goods arrived at the port. No doubt there was some mistake at first as to the identity of

the logs, but they were eventually ascertained and no intermediate rights had arisen to affect those of the shipowners. Those were the goods that were on the ship, and the goods to which the lien of the shipowners attached. The plaintiffs' appeal was allowed. There was a cross-appeal but that was dismissed. Lord Alverstone and Sir Francis Jeune concurred in the judgment delivered by the Lord Chancellor.[1]

By a charter-party dated 13th February, 1900, and made between *Hessler & Co.* as owners, and *Tyrer & Co.* as charterers, the steamship *Lagom* was let by the owners to the charterers for a term of about nine calendar months, on the following (amongst other) conditions: That the owners should pay for the wages of the captain and crew; that the charterers should pay for the hire of the vessel at the rate of £425 per calendar month, commencing on the day of delivery, and at the same rate for any part of a month "payment to be made in cash, fortnightly, in advance, to owners in West Hartlepool, and in default of such payment or payments, as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers," that the charterers should provide and pay for all the coal, port charges, pilotages, agencies, commissions, expenses of loading and unloading, that the captain, although appointed by the owners, should be under the order and directions of the charterers as regards employment.

The *Lagom* was handed over to the charterers under the charter-party on 6th April, 1900, on which day

[1] See 19 *T.L.R.*, 251, at pp. 251, 253.

the first fortnight's hire was only paid in advance. The second payment of hire was due on 20th April, and it was paid on 27th April; the third payment was made on 10th May; the fourth on 26th May; and the fifth on 11th June. No complaint was ever made by the owners about the hire not being paid absolutely on the day when it was due, and no suggestion was ever made that if the hire was not paid on the actual date when it became due, the vessel would be withdrawn from the service of the charterers. On 21st June another fortnight's hire became due in advance. No application for payment was made, nor was any debit note sent, and no intimation was given that if the hire was not paid the vessel would be withdrawn from the charterer's service.

The only question which the Court of Appeal had to decide was whether there was any evidence that the shipowners had waived the punctual payment of the hire. The judges (Vaughan, Williams, Romer, and Mathew, L.JJ.) were unanimously of opinion that there was no evidence of waiver whatever, and, therefore, the appeal was allowed.[1]

A charter-party contained the clause that the cargo was "To be received from alongside free of expense and risk to the ship according to the customs and laws at the port of destination, with customary despatch within thirty-five weather working days after receipt by consignees of captain's written notice that he is ready to discharge. . . . Demurrage in unloading, if any, to be paid by consignees at the rate of 3d. per net registered ton per running day, except in

[1] See *Hessler & Co.* v. *Tyrer & Co.*, 18 *T.L.R.*, 589.

case of unavoidable accidents or hindrances beyond the consignees' control. The words "within thirty-five working days" were written in ink, and the rest of the above clause was printed. The agreed freight was twenty-five shillings per ton. It was held that the above clause excepted the consignee from liability for the demurrage in the event of hindrances beyond his control.[1]

A charter-party excepted the usual perils and "all other accidents, even though caused by negligence, fault or error on the part of the pilot, captain, sailors, or other servants of the owners, in the management or navigation of the vessel or otherwise". Bags of sugar were shipped. The stevedores in discharging the bags were reckless and perhaps wanton but not wilful. They did not intend to damage or destroy, they intended to hurry over the discharge, and to take their chance of doing or not doing damage. They handed many bags without damaging them. The balance were damaged, and as each bag was damaged it was an accident, though no doubt an unlikely one. It was decided by Phillimore, J., that the shipowners were not liable, as the loss caused came within the exception above set out and that the word "*otherwise*" included the receiving and delivering of the cargo.[2]

[1] See *Aktieselskabet Argentina* v. *Von Laer*, 19 *T.L.R.*, 151 (1903), affirmed by Court of Appeal, 29th Oct., 1903 (see 20 *T.L.R.*, 9).

[2] See the "*Torbryan*," 19 *T.L.R.*, 106, affirmed by Court of Appeal, 16th July, 1903 (see 19 *T.L.R.*, 625).

PART II.

THE LAW RELATING TO BILLS OF LADING.

CHAPTER I.

Lord Blackburn's definition of a Bill of Lading—Other Definitions—Bills of Lading Act, 1855—Case of *Brown* v. *Powell Coal Co.*—Person claiming as Assignee under Bill of Lading—Case of *Glynn, Mills & Co.* v. *East and West India Dock Co.*—Captain of Ship not in position of Purchaser from Holder of Bill of Lading—Person producing Bill of Lading—Person entering into Contract without Notice of any Assignment of Bill of Lading—Goods placed in Custody of a Dock Company.

A BILL of lading, as defined by Lord Blackburn "is a writing signed on behalf of the owner of the ship in which goods are embarked acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading".[1]

Such an instrument may also be defined as a negotiable security, transferable by indorsement, made singly or in sets of two, three, four or six or even eight parts (but three is the usual number), signed by the master or purser of a ship, or by an agent or clerk of the owners or charterers, or by a broker *per*

[1] See Blackburn on sale, p. 275.

procuration, such person being expressly or impliedly authorised to do so. Again, "a bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board the master acquires a special property to support that possession, which he holds in the right of another, to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. This indorsement of the bill of lading is, simply a direction of the delivery of the goods." It has further been defined as "an acknowledgment under the hand of the captain that he has received such goods (loaded on board his ship), which he undertakes to deliver to the person named in the bill of lading".[1]

By the Bills of Lading Act, 1855 (18 & 19 Vic., cap. 111), it is enacted that every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. Moreover, nothing in that

[1] See *Lickbarrow* v. *Mason*, 1 *Sm. L.C.*, 674.

Act contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement. Furthermore, every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board. Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

In the case of *Brown* v. *Powell Coal Company* it was decided that the Bills of Lading Act, 1855, does not make the bill of lading conclusive evidence against anyone but a person actually signing it, or in whose name and with whose authority it is signed. As an illustration, a shipowner is not bound by his master's signature under a contract by charter-party for "the master to sign bills of lading for weight of cargo as presented to him by the charterers". (This was the clause used in the charter-party in that case.)

"Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. *The primary office and purpose of a bill of lading*, although by mercantile law and usage it is a symbol of the right of property in the goods, *is to express the terms of the contract between the shipper and the shipowner*. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that 'the one of these bills being accomplished, the others are to stand void'. It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bonâ fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice any more than a change of title is to be presumed in any other case when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice indeed that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to

inquire whether there has in fact been an assignment or not; and in the absence of such usage I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry. This conclusion is in accordance with the authorities, and also with the principle of such decisions as those of your lordship's house in *Shaw* v. *Foster* and *London and County Banking Company* v. *Radcliffe*. . . . It is clear, therefore, that the shipowner may be discharged by a *bonâ fide* delivery, under the terms of his contract with the shipper, to a person who is not the true owner, and there is no sufficient reason for refusing him the benefit of that contract, when the part of the bill of lading on which he makes a like *bonâ fide* delivery is not indorsed."[1]

"When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself.[2] And the very object of making the bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had. The consequence of making a document of title in parts is, that it is possible that one part may come into the hands of one person who *bonâ fide* gave value for it under the belief that he thereby acquired an interest

[1] See per Lord Selborne in *Glynn, Mills & Co.* v. *East and West India Dock Co.*, 7 *App. Cas.*, 591.

[2] See *Barber* v. *Meyerstein*, *L.R.*, 4 *H.L.*, 326.

in the goods, either as purchaser, mortgagee or pawnee, and another part may come into the hands of another person who, with equal *bonâ fides*, gave value for it under the belief that he thereby acquired a similar interest. This cannot well happen, unless there is a fraud on the part of those who pass the two parts to different persons, such as would in most cases bring them within the grasp of the criminal law, and from the nature of the transaction such a fraud must speedily be detected; the cases, therefore, in which it occurs are not very frequent. Nevertheless it does at times occur, and there are cases in our Courts where the rights of the two holders have had to be considered. The last of these cases was *Barber* v. *Meyerstein* (see above), and so far as that decision extends the law must be taken to be settled." That case settles that the mere fact that there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bills of lading were left in order that he might seem to be the owner though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors Act have a good title.

The master of a ship, however, "is not in the position of a purchaser from the holder or person supposed to be the holder of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods and to deliver them to the persons

named in the bill of lading . . . or their assigns, that is, assigns of the bill of lading, not assigns of the goods. . . . If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear"—he would fulfil the contract if he delivered to the persons named in the bill of lading on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to anyone producing the bill of lading with a genuine indorsement of the persons named in the bill of lading. He would not fulfil his contract if he delivered them to anyone else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract.

"But where the person who produces a bill of lading is one who—either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill—would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.[1] 'It is the undoubted practice to deliver without inquiry to anyone who produces a bill of lading,' *i.e.*, when no other is brought forward, and unless this was the *practice* the

[1] Lord Blackburn in *Glynn Mills & Co.* v. *East and West India Dock Co.* (above).

business of a shipowner could not be carried on unless bills of lading were made in only one part.[1] Where a person enters into a contract, and *without notice of any assignment* fulfils it to the person with whom he made the contract, he is discharged from his obligation. To repeat, where the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong. It probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not be safe in such a case in delivering without further inquiry. But when the master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him." Furthermore, "a warehouseman taking the custody of the goods under the provisions of section 66 of the Merchant Shipping Act, 1862, is under an obligation cast upon him by the statute to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master.

Where goods are placed in the custody of a dock company, its duty in regard to the delivery of the goods differs in no respect from that of the shipowner.

[1] See *Fearon* v. *Bowers*, 1 *Sm. L.C.* (8th edition), 782.

"The nature and extent of the obligation undertaken by the shipowner to deliver the goods at the end of the voyage must depend upon the terms of the bill of lading, which contains his contract with the shipper; and every assignee of a bill of lading has notice of, and must be bound by, those stipulations which have been introduced into the contract for his own protection by the shipowner."

In the case of *Borthwick* v. *Elderslie Steamship Co.*,[1] bills of lading were respectively headed "Refrigerator Bill of Lading" and contained the two following material clauses. The first clause was in printed Roman type, as follows: "Neither the steamer nor her owners, nor her charterers shall be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners, or charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods or any part thereof, considered necessary on account of decomposition or otherwise."

The second clause was printed in small italics and

[1] 19 *T.L.R.*, 313.

was as follows. "The Act of God, the King's enemies, pirates, robbers or thieves on land or sea (but not pilferage), arrests or restraints of princes, rulers or people, riots, strikes, or lock-outs or other labour disturbances, or delay or hindrance caused directly or indirectly thereby, and loss or damage resulting therefrom or from any of the following causes or perils are excepted—*viz.*, insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, draining, sweating, evaporation or decay, resulting from bad stowage or otherwise, or from the breakage or flow of, or from contact with the urine, manure, water, or drainage from horses, cattle, sheep or other animals carried on the said ship or from their stalls, however caused or otherwise howsoever; injurious effects of other goods, whether arising from bad stowage or otherwise; effects of climate, insufficiency of ventilation, or temperature of holds; risk of craft of transhipment, and of stowage afloat or on shore, fire on board, in hulk, in craft or on shore; rain, hail, snow, frost or ice; explosion, barratry, jettison, collision, whether with another ship or any other obstacle, standing, lying upon, or touching the ground; perils of the seas, rivers or navigation of whatever nature or kind, and howsoever caused; whether or not any of the perils, causes or things above mentioned or the loss or injury arising therefrom be occasioned by, or arise from, any act or omission, negligence, default or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband, or managers, or other persons

whomsoever in the service of the owners or charterers, whether on board the said ship or on shore, or on board any other ship belonging to, or chartered by them, or for whose acts they would otherwise be liable whether such act, omission, negligence, default or error in judgment, shall have occurred before, or after, the commencement of or during the voyage, or any other causes beyond the control of the owners or charterers or by or from any accidents to, or defects latent or otherwise in hull, tackle, boilers or machinery, refrigeration or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness." In constructing the above clauses Mr. Justice Walton said, in giving judgment, that he did not attach much importance to the fact that the two clauses were in different types. The clause in larger type was not less important on that account. The clause was very far-reaching, and contained exceptions of the widest possible kind. It was perfectly clear and easy to understand. With regard to the clause in smaller type, it referred to a great many possible causes of damage which were not very applicable to the carriage of a cargo of mutton. The clause in smaller type was very much more limited than that in the larger type. In his opinion, the clause in the larger type was inserted for the purpose of giving a wider scope to the clause in the smaller type. "The shipowner had his doubts about the

meaning of the clause in the smaller type, and he had inserted a perfectly clear and sweeping clause in the larger type." Therefore the clause in the larger type was the governing clause and the defendants were exempted from liability and he gave judgment for them.

CHAPTER II.

Stipulation "*The one of which Bills being accomplished, the others to stand void*"—Several Bills of Lading of different Imports—Bill of Lading generally Signed by Master of Ship—Incumbent on Shipmaster to perform Duty of seeing to Accuracy of Dates, etc., on which Goods were Shipped—Settled and Salutary Principle of Mercantile Law in Reference to the mere Employment of a Broker—Employment of Person to act as Agent in finding a Ship's Cargo carries implied Powers—Lord Tenterden and Duty of Ship's Captain to Employer—Duties of Master of Vessel—Meaning of words "*Received subject to the Conditions contained in Bill of Lading to be issued for the same*"—Signification of words in Shipping Note "No Goods to be received on Board unless a Clean Receipt can be given"—What must be Proved in order to constitute a Conversion—A "Through" Bill of Lading—Case of *Sandars* v. *Maclean.*

THE stipulation "*The one of which bills being accomplished, the others to stand void*" is "a stipulation between the shipper and the shipowner, and is plainly intended to give some measure of protection to the latter after he has delivered the goods upon one of the bills of lading against subsequent demands for delivery at the instance of the holders of the other bills of the set. It is, in my opinion, inconsistent with any reasonable construction of the stipulation that the shipowner should be held liable in all cases to deliver to the true owner of the goods, because

in that case, it would give him no protection. The stipulation can have no intelligible meaning or effect, if it does not, under some circumstances, enable the shipowner to resist a claim for second delivery, preferred by the holder of a bill of lading, who has, by virtue of it, the right of property in the goods. On the other hand, it is obvious that the stipulation is meant exclusively for the protection of the shipowner, and is not intended to confer upon him the right to select the person to whom he shall deliver, or to effect the rights *inter se* of the holders of the bills of lading. That being so, I think that the natural and reasonable construction of the language of the contract is that the shipowner is to be exonerated by delivery upon one of the bills of lading, although it does not represent the property in the goods—with this qualification that, *bonâ fides* being an implied term in every mercantile contract, the delivery must be made in good faith and without knowledge or notice of any right preferable to that of the person to whom he so delivers".[1] "In all transactions one great point to be kept uniformly in view is to make the circulation of property as quick, as easy, and as certain as possible."

The decision in *Glynn, Mills & Co.* v. *East and West India Dock Co.* does not profess to alter the established usage of European merchants. It only shows that it is attended in the case of fraud with a risk which had not been hitherto sufficiently understood. "If the mercantile world, having its atten-

[1] Lord Watson in *Glynn, Mills & Co.* v. *East and West India Dock Co.* (*sup.*).

tion called to this risk, chooses to alter its mode of doing business, that is a matter for its own decision. It may not think the disadvantage of the risk, even when explained, sufficient to justify a departure from the known and recognised modes of transacting commercial business; but until and unless it alters its method of dealing, and the forms of the well-known contracts by which it is done, I can only interpret its usages and its contracts as I find them, and I am satisfied that they are understood by the commercial world."

Where several bills of lading have been signed of different imports no reference is to be had to the time when they were signed by the captain; but the person who *first* gets one of them by a legal title from the owner or shipper has a right to the consignment, and where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all.

A bill of lading is usually signed by the master of the ship; but in the case of steamships it is the custom for the ship's broker and *not* the master to sign it. The date and the time of signing is a material part of a bill of lading, and the insertion of a particular date amounts to a distinct representation that the goods have been put on board before a specified time. It is the *special* duty of the master of the ship to attest by his signature the date as well as the fact of shipment. He is *not* bound to superintend in person the receipt and stowage of the goods; but, if he is not personally

cognisant of the fact and time of shipment, it is his personal duty to inform himself upon both these points by an examination of the mates' receipts, or of the log-book or otherwise before he signs a bill of lading for the goods. It seems to be altogether immaterial whether the failure of a shipmaster to check the date of a bill of lading which he signs be described as a breach of duty or as negligence, and his failure to do so cannot be legally excused unless he can show either that he was relieved of the duty (in which case there can be neither breach nor neglect), or that he made an honest endeavour to perform it, and failed through no fault of his own. Of course the owners may supersede in so far the functions of the master by committing to another agent the power or the duty of settling the whole terms of the bills of lading, including the fact of shipment, and also the date, or he may himself prepare the bills of lading, date included, and then ask the master to sign them. In these cases, the master would incur no responsibility to his employer by putting his signature to a complete bill of lading presented for his signature by the employer or his *alter ego* without examining the date.

It is incumbent on a shipmaster to perform the duty of seeing to the accuracy of the dates at which he certified that the goods had already been put on board. Furthermore, the captain of a vessel cannot be exonerated from the consequence of his admission except upon the ground that he was entitled to act upon the assumption that the duty of filling in the proper dates had already been performed by some

other person having authority from the shipowners to do so.

It is a settled and salutary principle of mercantile law that the mere employment of a broker at a foreign port to find a cargo for a ship, and to adjust the terms upon which it is to be carried, does not give him implied power to relieve the master who signs the bill of lading of his legal duty to the shipowner. Of course, there can be no doubt that, according to the ordinary course of business, the broker so employed prepares the bills of lading because they contain the terms of the contract of carriage; and these are matters as to which he is the sole representative of the shipowner, and with which the master has no concern. But the fact of the shipment of the goods to be carried, and the date of shipment, are matters within the province not of the broker but of the master, and when he certifies them, as the accredited agent of the shipowner, it is his duty to do so carefully and to the best of his knowledge, and he has no right to delegate that duty to other agents appointed for other purposes by his employer.

The employment of a person to act as agent in finding a cargo for a vessel carries with it many implied powers which are well known to the law, but which need not be enumerated here. To the extent of such powers the brokers are undoubtedly the representatives of the shipowners. But not one of these implied powers appears to come into collision with the functions of the master in regard to his signature of bills of lading, or to relieve him, when he does sign, of the duty of seeing that those parts of the

instrument for which he is responsible are correctly stated.

Lord Tenterden states in his book,[1] in dealing with the duty of the master to his employer, that "the great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his own part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention".

The duty of the master of a vessel is, therefore, to sign the bills of lading for the cargo received, and to use reasonable care and skill in seeing that the bill of lading is accurately drawn up which he does sign. Nevertheless, a master of a ship is guilty of a breach of duty in signing the bills of lading *without reading and without any examination of them*—a breach of duty for which, if loss occurs thereby to the owners, he becomes responsible to them.

The words "*Received subject to the conditions contained in bill of lading to be issued for the same*" were indorsed in the mate's receipt for a plaintiff's goods shipped on a defendant's steamship. Before the bill of lading had been exchanged for the mate's receipt, the plaintiff's goods were lost from causes against which the shipowner was protected by exceptions in the bill of lading. An action was brought by the plaintiff for the loss of his goods on the ground that they were led to believe by the defendant's conduct that the bills of lading referred to in the mate's receipt were in a different form, without the

[1] *Abbott on Shipping*, 12th edition, p. 122.

exceptions which exempted the shipowner from liability for the loss. But on the facts it was decided that the case was not made out, and that the plaintiffs could, if they had exercised ordinary and reasonable care, have informed themselves of the terms of the bill of lading."[1]

A shipping note contained the following words: "*No goods to be received on board unless a clean receipt can be given*". Plaintiffs sent goods for shipment by the defendant's steamship. A receipt for the goods was given in this form, "Received fifty casks; old casks". The defendants refused to give any other kind of receipt, and also refused to redeliver the goods. It was decided that the defendants were liable in conversion for the real loss sustained by the plaintiffs.[2] If a receipt is ostensibly given in order that the ship may sail away as soon as possible, and the plaintiff comes forward to complain of its incorrectness, the answer is that he should not have believed it to be true. And if the plaintiff has paid more money than was due by him, he may recover it. No appropriation of goods can be complete so as to vest the property in the consignee when the articles referred to are *not* on board the vessel in which they are intended to be consigned, and where the agent of a defendant has given his consent to treat the goods in his hands as the property of a particular party, he cannot dispute that party's property. As against a wrongdoer, very slight evidence

[1] See *De Clermont* v. *General Steam Navigation Co.* [1891], 7 *Times' L.R.*, 187.

[2] See *Armstrong* v. *Allan* [1892], 8 *Times' L.R.*, 613.

of appropriation will suffice. The same principle applies where the goods have been placed in the hands of a land carrier, and in the case of a common coasting vessel no bill of lading is necessary in order to pass the property in the goods. Plaintiffs are entitled to recover for breach of contract on the part of the master in not signing a proper bill of lading, but the departure of the vessel without a bill of lading being signed does *not* amount to a conversion. The captain is bound to do two things—to take the cargo to its destination, according to the terms of the charter-party, and he is also bound to give a bill of lading in the usual form, and not in any form he pleases to adopt. In other words, the captain of a vessel is bound to sign a bill of lading in *the ordinary form*, and not a bill of lading different from the ordinary forms, unless there is some special cause for his doing it. He has no right to put in a stipulation which is unusual, which may create difficulties and embarrassments, and which begs the question in his own favour, and then say, "There is no harm in it, therefore you ought not to object". And where a captain refuses to sign a bill of lading that he ought to have signed, he commits a breach of the contract, and it has been held to be a *conversion* if the master sails away with the cargo.[1] The captain is bound in duty to his owners to take care that the freight is paid, and he has a perfect right to refuse to deliver the cargo unless the freight is paid in full.

In order to constitute a conversion the person must exercise *dominion* over the goods, and carry

[1] See *Jones* v. *Hough*, 5 *Ex. Div.*, 115.

them away.[1] The captain of a ship may properly sign bills of lading in favour of the shipper of goods without production of the mate's receipts for the goods, provided he is satisfied otherwise that the goods are on board the vessel, and has no notice that anyone but the shipper claims any interest in them. Further, the owner *for value* of bills of lading has a better title than an indorsee of the mate's receipts.[2]

It may here be convenient to state what is known as a "*through*" *bill of lading*. Such a document is "made for the carriage of goods from one place to another by several shipowners or railway companies".[3] It is impossible, however, to state accurately how far the Sale of Goods Act, 1893, applies to a document of this nature. In the case of *Sandars* v. *Maclean*, decided in the Court of Appeal in 1883, Bowen, L.J., said:[4] "The law as to the indorsement of bills of lading is as clear as, in my opinion, the practice of all European merchants is thoroughly understood. A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the in-

[1] See *Falke* v. *Fletcher, Hiort & Bott* and *Peek* v. *Larsen*.

[2] See *Hathesing* v. *Laing*, *L.R.*, 17 *Eq.*, 92.

[3] See Scrutton on *Charter-Parties and Bills of Lading*, p. 57 (4th edition, 1899).

[4] See 11 *Q.B.D.*, at p. 341.

tention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

"The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the indorsee, the other originals of the set are as against it perfectly ineffectual and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit. By inveterate practice among most of the commercial nations of Europe, bills of lading have long been drawn by the shipowner in sets of three or more. Sometimes one of the set is retained by the captain, the others being transferred by the captain to the shipper. Sometimes the whole of the set are handed upon shipment to the merchant, the captain retaining a copy only. This practice of drawing bills of lading in triplicate may be at the present day, and under the altered conditions of communication between one part of the world and another less valuable than it was when originally

introduced. But it certainly had its distinct usages in the earlier period of European commerce, and it still survives. If it survives it is probably that the commercial world stills finds it more convenient or less troublesome to preserve it than to change it.

"And it is plain that the purpose and idea of drawing bills of lading in sets—whatever the present advantage or disadvantage of the plan—is that the whole set should not remain always in the same hands. The possibility of its separation is intentionally devised for the purpose not of fraud, but of protecting honest dealing. The separation may conceivably afford opportunities of fraud, if the holders chose to be dishonest, but on the whole the commercial world is satisfied to run the risk of this contingency for the sake of the compensating advantages and conveniences which merchants rightly or wrongly have, till lately, at all events, believed to be afforded by the system of triplicates or quadruplicates. The shipper or his vendees may prefer to retain one of the originals for their own protection against loss, or to transfer it to their correspondents. In such cases they are in the habit of treating the remainder of the set as the effective documents, and as sufficient for all purposes of negotiating the goods comprised in the bill of lading."

CHAPTER III.

Transfer of Goods at Common Law and in Equity—Sections 47 and 48 of the Sale of Goods Act, 1893—Receipt for Goods put on board Ship—Question whether Master of Ship signing Bill of Lading for Goods which have never been shipped binds Shipowner—Case *re* Freight and Dock Dues—Injury done prior to Bills of Lading Act, 1855—Signification of words "Signing the same" in Bills of Lading Act, 1855—Question whether Consignee of Goods under Bill of Lading has right to deduct any Freight.

AT common law, so also in equity, a transfer of goods for valuable consideration by a consignee for a limited purpose does not destroy the consigner's right of stoppage *in transitu*;[1] but the right of stoppage *in transitu* is wholly defeated when the bill of lading is assigned absolutely for a consideration which is wholly paid.[2]

By section 47 of the Sale of Goods Act, 1893, it is enacted that subject to the provisions of that Act the unpaid seller's right of lien [or retention] or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto. Provided that where a document of title to goods has

[1] See *Spalding* v. *Ruding*, 6 *Beav.*, 376; *Leask* v. *Scott* [1877], 2 *Q.B.D.*, 376, *C.A.*

[2] See *Lickbarrow* v. *Mason*, 1 *Sm. L.C.*, p. 937 (9th edition).

been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale the unpaid seller's right of lien [or retention] or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien [or retention] or stoppage *in transitu* can only be exercised subject to the rights of the transferee.[1]

Furthermore, by section 48, it is enacted that (1) subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien [or retention] or stoppage *in transitu;* (2) where an unpaid seller who has exercised his right of lien [or retention] or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer; (3) where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract; (4) where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

[1] See also sections 1 and 10 of the Factors Act, 1889.

It has been decided that where a receipt is given for goods put on board a ship it is the duty of the captain not to sign a bill of lading till that receipt is given up. And quite right too. If it were not so, it would be in the power of the master of the ship to elect which party should have the goods. The ship-owner, therefore, should always require such receipts to be given up in exchange for the bill of lading.[1]

The question whether the master of a ship signing a bill of lading for goods which have never been shipped is to be considered as the agent of the owner in that behalf, so as to make the latter responsible, may be answered by stating that the authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and employment of the ship, but is subject to several well-known limitations. He may make contracts for the hire of the ship, but *cannot* vary that which the owner has made. He may take up money in foreign ports, and under certain circumstances at home, for necessary disbursements for repairs, and bind the owners for repayment. But his authority is limited by the necessity of the case, and he cannot make his owners responsible for money not actually necessary for those purposes, although *he may pretend* that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free.

The same remarks apply with respect to goods put on board. He may sign a bill of lading and acknowledge the nature and quality and condition

[1] See *Thompson* v. *Traill*, 2 *C. & P.*, 334.

of the goods. Constant usage shows that masters have that general authority, and if a more limited one is given a party not informed of it, such party is not affected by such limitations. "The master is a *general agent* to perform all things relating to the usual employment of his ship, and the authority of such an agent to perform all things *usual in the line of business* in which he is employed cannot be limited by any private order or direction not known to the party dealing with him." It is *most unusual*, therefore, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board. All parties concerned have a right to assume that an agent *had authority to do all which is usual.* The very nature of a bill of lading shows that it ought *not* to be issued until the goods are on board, for it begins by describing them as shipped. "A bill of lading is an acknowledgment by the captain of having received the goods on board his ship, therefore, it would be a fraud in the captain to sign such a bill of lading if he *had not received the goods on board*, and the consignee would be entitled to his action against the captain for the fraud."[1] A bill of lading is not conclusive on the shipowner.

In a case decided in 1886, in the Court of Appeal, the action was brought by a shipowner for freight and dock dues. The defendants were the assignees of the bill of lading, and the property in the goods mentioned in the bill of lading had passed, and they set up a counter claim against the shipowner for no

[1] See *Lickbarrow* v. *Mason* (*ante*).

delivering all the goods specified in the bill of lading. The question was whether that counter claim was maintainable.

Prior to the Bills of Lading Act, 1855, if any injury was done to the goods so as to affect the rights of the person to whom, by the indorsement of the bill of lading, the property had passed, he could sue in respect of such injury. If the goods were misdelivered, or any other form of conversion had taken place, he could bring an action of trespass; that was by reason of his ownership of the goods. But he could not maintain an action upon the contract contained in the bill of lading. The question here was not whether the defendants could maintain an action as owners of the goods, but whether they could sue for a breach of the contract contained in the bill of lading. As we have pointed out (*ante*), section 1 of the Bills of Lading Act, 1855, enacts that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself". The contract contained in the bill of lading refers to all goods put on board the ship. It does not bind the owner of the ship as to more goods than those put on board. If the bill of lading signed by the master contains more goods than those actually put on board, the signature is beyond the master's authority; therefore, as far as

the first section goes, the contract is only binding as to the goods actually put on board.

The words "*signing the same*," used in the third section, do not necessarily mean the person who actually signs. If, for instance, a clerk in the shipowner's office signs *per pro.*, the owner might be the person signing within the meaning of the section. Or if the captain was so indisposed as thereby prevented him from signing himself and a servant signed for him, the captain would be the person signing. But in the case under review the signature was not that of a mere clerk or servant but of an agent, and he was the agent of the master, and not of the shipowner. Therefore, as the shipowner did not sign the bill of lading in the present case, he incurred no liability under the third section of the Bills of Lading Act, 1855. The bill of lading was signed as follows: "By authority of Captain ——, as agent". The principle of law as laid down in the above case is that "the master of a ship signing a bill of lading for goods which have never been shipped is *not* to be considered as agent of the owner in that behalf so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed". Moreover, when a captain of a vessel has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power by signing *other* bills of lading for goods that are not on board to charge his owner. Furthermore, *the captain of a vessel is precluded by the bill of lading* from denying that he has received goods and failed to deliver them; and under these

circumstances, there is a clear right of action for non-delivery. When the market value of the goods at the time they should have arrived is known, that value is the measure of damages; and when missing goods arrived later and were tendered to the plaintiffs for what they were worth, damages may be reduced to this extent, but the original right of action remains.

The question whether the consignee of goods under a bill of lading has a right to deduct from the freight payable on delivery of goods the value of articles which though mentioned in the bill of lading turn out not to have been put on board, may be answered in the negative; and, apparently, evidence of an usage to that effect is inadmissible. Moreover, section 3 of the Bills of Lading Act, 1855, does not make the bill of lading conclusive evidence against the *owner* that the goods were put on board. That statute operates where the bill of lading is signed by the master who is part owner, and who sues on behalf of himself and his co-owners. It seems that by a case decided as far back as 1864, if A. orders a cargo of ——, of B. at ——, with directions to charter a ship to bring it to ——, and B. accordingly charters a ship and forwards the bill of lading indorsed to A., with a draft for the invoice price which A. accepts and pays, A. is "*a consignee or indorsee for valuable consideration*" within the meaning of section 3 of the Bills of Lading Act, 1855.[1] As far as the *shipowner* is concerned, *generally speaking*, a bill of lading is no doubt *only primâ facie* and not *conclusive* evidence against him.

[1] See *Meyer* v. *Dresser*, 16 *C.B.* (N.S.), 646.

CHAPTER IV.

Contract to give "*Clean*" Bill of Lading—Question whether under Bills of Lading Act, 1855, every Holder is liable by reason of Indorsement only — Clause in Charter-Party, "*Conclusive Evidence against the Owners of the Quantity of Cargo Shipped on Board as stated therein*" —Bill of Lading acknowledging Receipt of certain specific things—Bill of Lading must be taken to be the Contract under which the Goods were Shipped—Matters in Reference to Construction of Bills of Lading—Master of Vessel Agent of Shipowner—"*Dead Freight*"—In construing Charter-Party Parties assumed to have understood Terms employed.

A CONTRACT to give a "*clean*" bill of lading means a bill of lading which contains nothing in the margin qualifying the words in the bill of lading itself.[1]

The question whether under the Bills of Lading Act, 1855 (18 & 19 Vic., cap. 111), every holder of a bill of lading indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it), is liable, by reason of such indorsement only, to an action for freight by the shipowner, although he may not have obtained delivery of the goods or derived any other benefit from his security, may be answered by stating that

[1] See *Restitution Steamship Co.* v. *Pirie*, 6 *Asp., Mar. Law Cases* (N.S.), 428.

the mere indorsement and delivery of a bill of lading by way of pledge for a loan does *not* pass "*the property in the goods*" to the indorsee, so as to transfer to him all liabilities in respect of the goods within section 1 of the Bills of Lading Act, 1855.[1]

In one charter-party it was agreed that the bills of lading should be "*conclusive evidence against the owners of the quantity of cargo shipped on board as stated therein*". The captain of the vessel signed bills of lading for a quantity of cargo which had been received by the shipowners' agents alongside the vessel, and had been lost prior to being put on board. An action was therefore brought by the consignees against the shipowners for the value of the cargo so lost. It was decided that the consignees were entitled to recover.[2]

If a bill of lading acknowledges the receipt of certain specific things—a certain number of horses, for instance—it might be that the plaintiff could not give evidence in a court of justice to say that a different number was shipped in fact. But that cannot be said of a mere statement of *weight*, which may, and often does, vary during the transit; and, therefore, there cannot be any estoppel to prevent the plaintiff from saying that the measurement was wrong where it has not been suggested that a wrong weight was inserted *fraudulently* in order to enhance the lump freight recoverable.

The bill of lading must be taken to be the contract under which the goods were shipped. The terms of

[1] See *Sewell* v. *Burdick*, 10 *App. Cas.*, 74.

[2] See *Fisher* v. *Caldwell* [1896], 1 *Com. Cas.*, 456.

the Bills of Lading Act prove that the legislature looked upon a bill of lading as containing the terms of the contract of carriage; and it is a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined. Accordingly, it should be provided for in the bill of lading. Where there is a charter-party, as between the shipowner and the charterer, the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charter-party; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but where the bill of lading is indorsed over, as between the shipowner and the indorsee, the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods. Where there is no charter-party as between the grantee of the bill of lading and the shipowner, the bill of lading is no doubt a receipt for the goods, and as such, like any other receipt, is *not conclusive*, for it may be controverted by evidence showing that the goods were not received; the question whether it will be more than a receipt as between the shipper and shipowner depends on whether the captain has received the goods, because he has no authority to make a contract of carriage to bind the shipowner except in respect of goods received by him. Where the goods have *not been received*, the bill of lading cannot contain the terms of a contract

of carriage with respect to them as against the shipowner. But if the goods have been received by the captain, it is the evidence in writing of what the contract of carriage between the parties is; it may be true that the contract of carriage is made before it is given, because it would generally be made before the goods are sent down to the ship; but when the goods are put on board the vessel the captain has authority to reduce the contract to writing, and then the general doctrine of the law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, oral evidence to alter or qualify the effect of such writing is inadmissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract.

As to the matter of construction of a bill of lading, the power to deviate from the voyage so described *must be confined to that given by the bill of lading* in terms, and liberty to call at the ports intended to be given must be ports which are *substantially ports which will be passed on the named voyage.* To "*call*" at a port is a well-known sea term; it signifies, of course, to call for the purposes of business, generally to take in or unload cargo or to receive orders; it must certainly mean that the vessel may stop at the port of call for a time, or what would be the reason of the liberty to call? It would, of course, be useless.

As has been previously pointed out, the master of a vessel is the agent of the shipowner in every contract made in the usual course of the employment

of the ship. And although he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, nevertheless, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the burden of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent.

"*Dead freight*" is not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight. A sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight because it was described under that name in the bill of lading; it is, in effect, money to be paid for taking the goods, and undertaking to carry, and not for carrying them.[1] A clause mutually binding the shipowner and the shipper and the freight and the cargo in a penalty cannot be considered as intended to give the shipowner a lien for the non-performance of the covenant in the charter-party to load a full cargo. Even where there is an express stipulation to pay full freight, as if the goods had been actually loaded on board, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages, for the master may have filled the vacant space with the goods of

[1] See *Kirchner* v. *Venus*, 12 *Moo.*, *P.C.*, 361.

other persons, and the freighter would be entitled to have an allowance for the profit thus made.

In construing a charter-party the parties must be assumed to have understood the meaning of the terms they employed. In a charter-party giving no specific sum as to the amount to be recovered by way of compensation for "*dead freight*," the shipowner becomes entitled only to a reasonable sum—which is another phrase for unliquidated damages. The term "*dead freight*," in respect of the remedy which it gives to the shipowner, *does not entitle him* to say that the deficient quantity shall be paid for at the rate assigned per ton in the charter-party. It should be particularly noted that it is impossible for any person to set up any consideration of *inconvenience* in answer to the clear terms of a contract. This should always be considered by the parties *prior to entering into* a specific stipulation. The shipowners' title under a bill of lading is controlled by their liability under the charter-party.

It is a question for a jury to decide whether a contract was a contract for "freight" contingent on the ship's arrival at her destination when goods are put on board a ship consigned to —— at —— per ton, payable in ——, or for a sum payable on the receipt of the goods on board her.[1] A penalty in a charter-party will only be held to be a penalty and not damages.

[1] See *Lidgett* v. *Perrin*, 11 *C.B.* (N.S.), 362.

CHAPTER V.

The words in a Charter-Party, "*Faults or Errors in Navigation or in the Management of the said Vessel*"—The Charter-Party the only Contract between Shipowner and Charterer—The well-known Principle of Law in reference to a futile Written Contract—Persons relying upon Difference between Foreign Law and the Law of the *Forum*—Delivery by Consignor to Carrier, Delivery to Consignee—Question whether the Goods were Delivered to the Carrier a Question of Fact—When Bill of Lading is Indorsed to give any Title to Transferee—Remedy of Shipowner at Common Law under Bill of Lading—Where Captain of Vessel improperly issues Bills of Lading—Effect of words, "*And other Conditions as per Charter Party*"—Case of *Morris & Morris* v. *Oceanic Steam Navigation Co.*—Consignee of Goods entitled to look to Bill of Lading alone for Conditions as to the Carriage of the Goods.

THE words "*faults or errors in navigation or in the management of the said vessel*" inserted in a charter-party apply to faults or errors in sailing the vessel or in managing the sailing of the vessel. If there is a porthole in a ship left unfastened, and the cargo is stowed in such a way that it would take a considerable time to get at the porthole and fasten it, the ship would be unseaworthy; but if it can be shut directly the necessity arose, the ship cannot be said to be unseaworthy.[1] Moreover, where a shipowner,

[1] See *Dobell* v. *Steamship Rosmore Co.* [1895], 2 *Q.B.*, 408, and *Hedley* v. *Pinkney & Sons Steam Co.* [1894], *A.C.*, 222.

through his properly-constituted agent (and the duty of that agent is to see that such porthole is closed) neglects to do so, the shipowner is liable. A clause in a charter-party which says, "If the owner exercises *due diligence* to make the vessel in all respects seaworthy," does not mean by himself *personally*, but by himself and his agents; so that if by himself and his agents he exercises due diligence to make the vessel seaworthy, then he is not to be liable to loss or damage resulting afterwards from faults or errors in navigation or in the management of the vessel.

"The only contract between the shipowner and the charterer is the charter-party, and as between the shipowner and the charterer the bill of lading is no part of the charter-party contract, and is nothing but a receipt for the goods put on board. The bill of lading which is given by the shipowner, according to a charter-party between him and the charterer, does by the mercantile law contain the terms of the contract by which the charterer is enabled to hand over or to assign to an assignee of a bill of lading. As between the shipowner and the assignee of a bill of lading, the bill of lading contains the terms of carriage—the terms of the contract; but, as between the shipowner and the charterer, the bill of lading given under the charter-party is no part of the charter-party contract. The terms of the bill of lading may, by reference to it in the charter-party, be written into the charter-party so as to become part of the charter-party contract."[1] Again, "Where

[1] Per Lord Esher in *Oriental Steamship Co.* v. *Taylor*, *C.A.*, 1893, at p. 521.

there is a charter-party . . . as between the charterers and shipowners, the terms of the contract of carriage are to be gathered from it. Where there is a bill of lading as well, its primary use is simply to act as a receipt for the goods shipped on board for carriage under the contract of carriage contained in the charter-party. The charter-party may make further use of the bill of lading, and it may be part of the contract that the bill of lading may serve some further purpose." [1]

It is a well-known principle of law that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual. The charterers cannot say that the obligation to present bills of lading ceases if the ship is lost. No such excuse for the non-performance of that obligation can be put forward, for the loss of the ship is not a circumstance which affects as between these parties the validity or commercial importance of the bills of lading. The bills of lading do not contain the contract to carry. They are the evidence of the receipt of the goods.

All persons who rely upon the difference between the foreign law and the law of the *forum* in which the case is brought are bound to establish that difference *by cogent evidence*.[2]

As a general rule, it is no doubt true that the delivery by the consignor to the carrier is a delivery

[1] Bowen, L.J., in same case.

[2] See the *Duero* [1869], *L.R.*, 2 *Ad. & Ec.*, 393.

to the consignee, and that the risk is after such delivery the risk of the consignee. This is so, if without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is more strongly so, if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent. But although the authorities all establish the general inference as just stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties or of any particular mode of dealing between them. If a particular contract be proved between the consignor and consignee, and the circumstances of the payment of the freight and insurance is not alone conclusive evidence of ownership—as where the party undertaking to consign undertakes to deliver at a particular place—the property till it reaches that place and is delivered according to the terms of the contract is at the risk of the consignor. And again, the following of the directions of the consignee, and delivering the goods to a particular carrier, will relieve the consignor from the risk. He may make such a special contract that though delivering the goods to the carrier specially intimated by the consignee, the risk may remain with him; and the consignor may by a contract with the carrier make the carrier liable to himself. In a word, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the

action against the carrier; yet if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action though the goods may be the property of the consignee.

The question whether the goods were delivered to the carrier is a question of fact for the jury to decide. Where there is no bill of lading, the consignee is the proper person to sue on the contract.[1] The same principle also applies where there is a bill of lading.[2] "Where there is a charter-party as between charterers and shipowners the bill of lading operates, *primâ facie*, as a mere receipt for goods, and a document of title which may be negotiated and by which the property is transferred *does not operate as a new contract* or alter the contract contained in the charter-party." "The proper construction of the two documents taken together is that, as between the shipowner and the charterer, the bill of lading, though inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods."[3]

When a bill of lading is indorsed to give any title to the transferee the entire property is passed.

At common law, the remedy of the shipowner under a bill of lading is by enforcing his lien upon the goods, or by bringing an action on the contract against *any-*

[1] See *Fragano* v. *Long*, 4 *Barn. & Cress.*, 219.

[2] See *Tronson* v. *Dent*, 8 *Moo., P.C.*, 419.

[3] See judgments in *Rodocanachi* v. *Milburn* (*sup.*); see also *Sewell* v. *Burdick* (*sup.*).

one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he may be sued as having been from the beginning a party to the contract. It is no uncommon thing to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. When there is such a writing it is, *in the absence of fraud, conclusive* as between the parties as to what they intended. The rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are *in substance* the same.

It has never yet been decided that the transfer of the bill of lading for value *necessarily*, whatever might be the intention, passed the *whole* legal property.[1] Where the captain of a vessel improperly issues bills of lading to the charterer without any authority from the shipowner, that will not enable the charterer to get better terms for his goods than under his charter-party.[2] "I do not think that because a bill of lading is signed by the captain as agent for the ship a contract is made between the shipowner and the freighter—the freighter having previously arranged with the charterer that the charterer shall carry his goods. I think that the remedy of the freighter would be against the charterer with whom he made

[1] See judgment of Lord Blackburn in *Sewell* v. *Burdick* (*sup.*).

[2] See *Pearson* v. *Goschen*, 33 *L.J.C.P.*, 265.

the contract of affreightment, and that he would not get an additional remedy because he had taken a bill of lading from the shipowner. It is sometimes said a bill of lading contains a contract. Such is the language of the Act of Parliament, 18 & 19 Vic., cap. 111 [the Bills of Lading Act], and in many instances it is accurate enough; but to say that it is a contract superseding, adding to, or varying the former contract under the charter-party, is a proposition of law to which I can never consent."[1]

The effect of the words "*and other conditions as per charter-party*" is to introduce into the bill of lading all those conditions of the charter-party which would have to be performed by the receiver of the goods—that is, all the conditions which would operate against the consignee. "The subsequent cases, I think, only show the practical mode of carrying out the principle of the decision in *Gray* v. *Carr*,[2] which is this: You are first to read into the bill of lading all the conditions of the charter-party; if some of those conditions are so large as not to be applicable to a bill of lading at all, they are to be treated as inconsistent, and must be struck out. This is the practical mode of carrying out the decision in *Gray* v. *Carr*. The subsequent cases have not enlarged the decision in *Gray* v. *Carr*, but they have rather in some respects limited it."[3] . . . "After full consideration I think

[1] Per Bramwell, L.J., in *Wagstaff* v. *Anderson*, 5 *C.P.D.*, at p. 177.

[2] *L.R.*, 6 *Q.B.*, 522.

[3] Per Lord Esher in *Serraino & Sons* v. *Campbell* [1891], 1 *Q.B.*, pp. 289, 290.

that the words [that is, *and other conditions as per charter-party*] ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee of the goods. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee—indeed, they are not conditions which have to be performed by anyone. The perils of the sea are left unaffected if there is no reference to them in the bill of lading; the excepted perils are those only which are mentioned in the bill of lading."

The case of *Morris & Morris* v. *Oceanic Steam Navigation Company*, decided by Mathew, J., in the Commercial Court on 31st July, 1900, was an action in respect of damages caused by water to a consignment of Havana cigars while in course of transit from New York to Liverpool in the *Teutonic*, to be forwarded to London. In the White Star bill of lading were inserted the following clauses: "That the carrier should not be liable for loss or damage occasioned by any latent defect in hull, machinery or appurtenances, or unseaworthiness of the ship, even existing at the time of shipment or sailing on the voyage, provided the owners had exercised due diligence to make the vessel seaworthy; that the shipment was subject to all the terms and provisions of, and all exemptions from, liability contained in the *Harter Act*. . . . It is also mutually agreed that the value of each package receipted for as above does not exceed the sum of $100 unless otherwise stated herein, on which basis the rate of freight is adjusted, and that the ship and carrier shall not be liable for articles specified in section 4,281 of the

United States Revised Statutes" [which section enacts that "If any shipper of platina, gold, gold dust, silver bullion, or other precious metals, coins, jewellery, bills of any bank or public body, diamonds or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them contained in any parcel or package or trunk, shall load the same as freight or baggage, or any vessel without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered"], "unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading. In this particular bill of lading the cigars were described as of unknown value. Mr. Justice Mathew, in the course of his judgment, said that although a port might be open, if it was possible to close it the owner was entitled to rely upon the care of those in charge, and the ship was properly equipped and not

unseaworthy; but if the port could not be closed after the cargo had been taken on board, then the ship would be unseaworthy. The latter case supplied the true analogy to the present case, and his lordship gave judgment for the plaintiffs, but the amount recoverable would have to be ascertained according to the principle as laid down by him.

The parties, in another case, mistook the effect of their inserting in the bill of lading tne words "*and all other conditions as per charter*". What they really ought to have said was "*all perils excepted as per charter-party*," or "*negligence clause as per charter-party*". They said nothing which could have had that effect. The consignee of goods is entitled to look to the bill of lading alone for the conditions upon which the goods are carried, and he is not bound to look to anything else.

CHAPTER VI.

The words "*Paying Freight for the said Goods and all other Conditions as per Charter-Party*," what they do not Incorporate—Meaning of the expression "*Against Payment of the agreed Freight, and other Conditions as per Charter-Party*"—The immediate Context in any Bill of Lading important—The words "*On Paying Freight for the said Goods, and all other Conditions as per Charter-Party*"—Demurrage at Port of Delivery—The words "*Other Conditions as per Charter-Party*"—The meaning of the expression "*Without Prejudice to the Charter-Party*"—Right of Vendor to stop *in transitu*—Parting with the Bill of Lading when the Goods are at Sea.

UNDER a bill of lading the goods were made deliverable to order or assigns "*paying freight for the said goods, and all other conditions as per charter-party*". It was decided in that case, that these words did not incorporate an exception in the charter-party as to "acts of enemies and restraints of princes".[1] Where one of the parties to a contract has introduced a stipulation for his own benefit, it is a well settled rule that if the meaning be doubtful the other party to the contract shall have the benefit of the doubt, and the same rule may be expressed in other words by saying that if the shipowner meant to add to the risks specifically enumerated in the bill of lading he

[1] See *Russell* v. *Niemann*, 17 *C.B.* (N.S.), 163.

is bound to make this quite clear on the face of the contract.[1]

The words used in one bill of lading were that the goods were to be delivered "*against payment of the agreed freight, and other conditions as per charter-party*". These words were held to mean some payment beyond freight stipulated for in the charter-party, which must be demurrage.[2] And in a later case this decision was entirely approved of, Lord Campbell holding that demurrage at the port of loading was not payable by the consignee where the words in the bill of lading were "*paying for the goods as per charter-party*," because by those words "the reference to the charter-party must be considered merely to ascertain the rate of freight," and paying for the goods *did not mean* paying for the detention of the ship by the charterer.[3]

The author may here point out that the immediate context of the words in any bill of lading to be construed is of *great importance*, and that where the words are placed in a clause which begins "the consignees paying freight and all other conditions," etc., the bill of lading must be read to refer to conditions to be observed by the consignee.

In another case the words in the bill of lading were "*on paying freight for the said goods, and all other conditions as per charter-party*". The charter-

[1] See judgment of James, L.J., in *German* v. *Chapman*, 7 *Ch. D.*, 276.

[2] See *Wegeer* v. *Smith*, 15 *C.B.*, 285.

[3] See *Smith* v. *Sieveking*, 4 *E. & B.*, 945 (affirmed in *Ex.*, 5 *E. & B.*, 589).

party provided for demurrage at the port of discharge. The ship ostensibly was employed as a general ship, and the goods of the particular consignee were in the main-hold under the goods of other shippers, who failed to take away their goods in proper time, so that without any fault of the defendants three days' demurrage was incurred before they obtained delivery. They were held liable, because the condition as to demurrage at the port of delivery was imported into the bill of lading by the words "*all other conditions*".

Demurrage at the port of delivery might reasonably, according to the case of *Russell* v. *Niemann* (see *ante*), be held to be one of the payments to be made by the consignee under the words "*paying freight for the said goods, and all other conditions as per charter-party*," and though it was a hard case on the particular consignee, that could not be a particular reason for saying that he had not so contracted.

In another case, the words used were "*other conditions as per charter-party*," and it was argued that those words made the consignee liable for an amount of freight stipulated for in the charter-party which exceeded the amount specified in the bill of lading. Lord Esher rejected it, however, and stated that the general reference to the charter-party only brought into the bill of lading "those clauses of the charter-party which are applicable to the contract in the bill of lading; and those clauses of the charter-party cannot be brought in which would alter the express stipulations in the bill of lading". The other judges agreed.[1]

[1] See *Gardner* v. *Trechmann*, 15 *Q.B.D.*, 154.

The true result of the authorities is that in each case the court must decide from the context and such surrounding circumstances as it is bound to regard which clauses of the charter-party are to be incorporated into the bill of lading by such words as "*all other conditions as per charter-party*," and where certain risks are expressly excepted in the bill of lading, it is not a legitimate construction of the clauses of reference to give it the effect of importing other and larger exceptions because they are contained in the charter-party.

"The meaning of '*without prejudice to the charter-party*' is, that notwithstanding any engagement made by the bills of lading, that contract shall remain unaltered."[1] The effect of indorsing a bill of lading on the goods to which it has reference altogether depends on the intention with which the indorsement is made. If by the terms of a bill of lading the goods are to be delivered to a particular consignee or his assigns, the master is not entitled to deliver the goods to such consignee *without the production* of one of the parts of the bill of lading.[2]

The right of a vendor to stop *in transitu* exists so long as the *transitus* is *not* at an end, and as a *general rule* the mere sale of goods while they are *in transitu* does *not* determine the *transitus*. This is quite settled by the cases. A mere transfer of a bill of lading or any other sale of the goods does *not* determine the *transitus*. "The vendee has the legal right to the goods the moment the contract is

[1] Per Lord Esher in *Hansen* v. *Harrold* [1894], 1 *Q.B.*, 619.
[2] See the *Stettin*, 14 *P.D.*, 142.

executed, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons."[1] The assignment of a bill of lading by the consignees for a valuable consideration, and without notice by the party taking it of a better title, passes the property in the goods thereby consigned.

It is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods *cannot discharge* himself by saying, "I have wrongfully made away with them, but that was before the accruer of your title". A plaintiff may have a perfectly good common law title, *independent of the Bills of Lading Act*, under which he can sue the defendant in his character as pledgee of the goods, and the defendant not producing the goods has no valid answer in saying, "I made away with them before your title accrued". "The plaintiff is the owner, and they are detained from him without sufficient legal excuse by the defendant, who ought to be in possession of them. If this action is not maintainable, I do not see how any action can be maintained by anybody, though the plaintiff has sustained great damage."

[1] Per Best, J., in *Hawes* v. *Watson*, 2 *B. & C.*, 540.

When goods are at sea, the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, *is parting with the ownership of the goods.* This, it will be readily understood, has been settled by the mercantile law and the mercantile world also. No decision can be found to the effect that any person taking an assignment of a bill of lading, *knowing that others existed*, is to be held to have been guilty of fraud simply from the fact of his so acting. The transaction is "*entire and complete when once the bill of lading has been assigned* as respects, at all events, goods *in transitu*, whether the assignment be by mortgage or by sale. If it were by sale other considerations would intervene which would give still greater efficacy to the assignment of the goods without delivery or possession. But when the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself. It appears to me, that to strike any conclusion of that kind would be to annihilate the course of mercantile procedure which has existed for a long period of time—far longer probably than I can at this moment accurately state.

"That being so, the judges have reasonably assumed that proposition as a point of undeniable law."

CHAPTER VII.

Period during which a Bill of Lading remains in Force—Two Symbols of Property in Goods imported—As soon as Delivery is made or Warrant for Delivery has been Issued — Shipowner and Payment of Freight — Con- 11 & 12 Vic., cap. 18, and 25 & 26 Vic., cap. 67—Consequences of Fraud — Where one Bill of Lading is in Possession of Wharfinger—Parting with Symbol of Property, parting with the Property itself—Conclusion.

THE bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it. In other words, "there can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it".

There are two symbols of property in goods imported: the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger, the former remains the only symbol of property in the goods.

"There has been adopted, for the convenience of mankind, a mode of dealing with property, the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot

deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them, the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time, bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it.

"It appears to me that is the legal sense of the transaction. The shipowner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods. But, unless he chooses to waive his rights, he is not bound so to deliver the goods, or to hand them over to the person who is the original consignee to whom he has contracted to make the delivery, until all the conditions on which he contracted to deliver them are fulfilled. One of those conditions is that the freight should be paid, and until the freight has been paid he is not bound to make the delivery."

The statutes dealing with shipping matters are not intended to deprive the shipowner of the right which he has to say that he will not part with the

with the possession of the goods until freight is paid. Accordingly, there should be a power on the part of the shipowner to relieve himself from the responsibility, which might be extremely inconvenient to all parties of keeping the goods on board when either the consignee was not ascertained, or when, if ascertained, there were some laches on his part in demanding the delivery of the goods. In such a case the shipowner, by depositing them in a warehouse, placed them in such a condition that if their owner could not be ascertained the goods should be considered as if they were still at sea, in the absolute possession of the master to all intents and purposes. But if the owner of the goods could be ascertained, and the only question was the question of freight, still the statute provided that the shipowner should be protected, that he should not be bound to hand over the goods absolutely, but that he should hand them over *sub modo*, with the full right of retaining his lien on the goods themselves, and with the right of preventing them being dealt with or removed until that lien should be satisfied. The *legal effect of the proceeding* is this, that the proprietor or consignee may require the goods to be landed at a wharf and to be warehoused in his name, but subject to this condition that the shipowner still retains his interest in the cargo until his charge for freight has been defrayed. If he gives notice of that charge *prior* to any act being done by which the ownership of the goods is changed, *prior* to the acceptance of an order for delivery, and *prior* to the issue of a warrant for delivery, *then the shipowner's lien* holds and attaches

itself to those goods, and the goods cannot be removed; the bills of lading *cannot be considered as having been fully spent or exhausted*, because there remains an important part of the contract unfulfilled on the part of the consignee, namely, payment of the freight in respect of which the contract was entered into.

Such has been the law hitherto, and the consequences of fraud, whatever they may be, have not been considered such as to counter-balance the great advantages and facilities afforded by the transfer of bills of lading. "There is no authority or reason for holding that the person who *first obtains the assignment of a bill of lading, and has given value for it*, shall *not* acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind."

When once the bill of lading is in the possession of the wharfinger it remains in force so long as complete delivery and possession has not been given to some person having the right to claim such delivery and possession.

It should be particularly noted, that the parting with the symbol of property (the possession of which cannot be delivered) is the parting with the property itself, and persons who have not the complete ownership cannot be said to have such a title to that property as to divest the operation of the symbol to give a title to it until something occurs which brings the symbol and the property itself into contact; and for the purpose of so bringing the property and the symbol into contact there must be a complete concurrence of title in the person who holds the

symbol and the person who has the right to demand the property, and until that happens the symbol has not exhausted its office.

In *Parsons* v. *New Zealand Shipping Company*,[1] tried originally before Kennedy, J., the bill of lading provided that the vessel would not be responsible for correct delivery of goods unless such package shipped was distinctly, correctly, and permanently marked, prior to shipment, with the mark and number or address. The endorsee of the bill of lading refused to take delivery of the goods which had been wrongly marked. It was held by Collins and Romer, L.JJ., A. L. Smith (M.R.) dissenting, that as the difference in the marks only affected the identification of the goods shipped, the shipowners were not prevented by section 3 of the Bills of Lading Act, 1855, from showing that the goods so marked formed part of the goods comprised in the bill of lading. The appeal, therefore, was dismissed and the decision of Kennedy, J., affirmed.

A bill of lading contained the following exception, "perils of the seas or navigation of whatever nature or kind soever (whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise, howsoever)". Goods were shipped under the bill of lading containing this exception.

During the voyage the valve of the deep tank was opened by the engineer by mistake, and part of the cargo stowed near such tank was damaged. It was

[1] 17 *T.L.R.*, 274.

held by Walton, J., that the damage was caused by a peril of the seas within the above exception, and that the shipowners were not liable.[1]

In *Rowson* v. *Atlantic Transport Company*,[2] the question to be decided turned upon section 3 of the "Harter Act" which was incorporated in the bill of lading. By section 3 of that Act it is provided "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel".

Under the bill of lading butter was shipped in a vessel for transport from New York to London. The vessel was in all respects seaworthy, properly manned and equipped.

During the voyage, however, the said cargo became damaged through the negligent working of the refrigerating apparatus. It was *held* that the refrigerating apparatus was part of the ship both in regard

[1] See *Blackburn and Sohsten* v. *Liverpool, Brazils, and River Plate Navigation Company*, 18 *T.L.R.*, 821. The law relating to exceptions of this description is accurately stated in the case of the "*Xantho*" (12 App. Cas., 503). If any of my readers have the time and inclination they cannot do better than peruse this important case.

[2] 19 *T.L.R.*, 67, affirmed by Court of Appeal, 5th August, 1903, see *L.J.*, 15th August, 1903.

to seaworthiness and management, and that the defendants had brought themselves within the first half of section 3 of the Harter Act (above cited) and that they were entitled to the protection of the Act, and judgment was given for them.

Bills of lading were issued for a cargo of timber which incorporated all the terms and conditions of the voyage charter, and were signed by the captain of the S.S. *Huddersfield*, with the words "as Master," which were printed on the bills of lading, struck out and the words "as agent for time charterers" substituted in writing. By the bills of lading it was stated that a certain number of pitch pine boards and pitch pine logs were shipped, and the plaintiffs who were holders for value of the bills of lading alleged that there was a shortage of boards and logs amounting to £104 16s. 10d. It was *held* by Mr. Justice Walton that if the master had signed, *as master*, he would have been making a contract for the shipowners, but he did not do so. Under the whole circumstances of the case the contract by the bills of lading was not made for the shipowners, nor did the master propose to act for the shipowners, nor had he apparent authority, therefore he gave judgment for the defendants, as the plaintiff's claim was not made out.[1]

The broad principle which should be applied to the construction of a bill of lading, or any other contract (such as a charter-party) relating to the carriage of goods by sea, is to this effect, that in the case of

[1] See *Harrison* v. *Huddersfield Steamship Company*, 19 *T.L.R.*, 386.

carriage of goods by sea the law places certain obligations upon the shipowner which will always bind him unless there are in such contract clear words which will without any ambiguity relieve him from his common law liability.

"The common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo which is shipped upon it. If a shipowner desires to evade this responsibility, he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation."[1]

To sum up. The bill of lading as long as the engagement to the shipowner has not been fulfilled, is a living current instrument, and no doubt the transfer of it for value passes the absolute property in the goods. There can be no question that the handing over the bill of lading for any advance under ordinary circumstances as completely vests the property in the pledgee as if the goods had been put into his own warehouse. There can be no doubt, therefore, that the *first* person who for value gets the transfer of a bill of lading, though it be one of a set of three bills, acquires the property, and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first

[1] Bigham, J., in *Waikato* v. *New Zealand Shipping Co.* (1898), 1 *Q.B.*, 645, at p. 647, affirmed by Court of Appeal (1899), 1 *Q.B.*, 56, and see judgment of Lord Blackburn in *Steel* v. *State Line Steamship Co.*, 3 *App. Cas.*, at p. 86, cited and followed in *Rathbone Bros. & Co.* v. *David McIver & Sons*, 19 *T.L. Rep.*, 590, *C.A.*, 2nd July, 1903.

obtains a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may on the second bill being presented by another party be justified in delivering the goods to that party. But although that may be a discharge to the shipowner it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property.

APPENDIX I.

ORDINARY FORM OF CHARTER-PARTY.

It is this day mutually agreed between of the good ship or vessel called the , of the measurement of tons register, or thereabouts, and merchant, that the said ship being tight, staunch and strong, and in every way fitted for the voyage, shall with all convenient speed sail and proceed to , or as near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo, *which is to be brought to and taken from alongside at merchant's risk and expense*, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to , or as near thereunto as she may safely get, and deliver the same on being paid freight.

Restraint of princes and rulers, the act of God, the Queen's enemies, fire, and all and every other dangers and cacidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage, always excepted.

Freight to be paid on the right delivery of the cargo; days to be allowed the said merchant (if the ship be not sooner dispatched), for and days on demurrage over and above the said laying days, at £ per day.

Penalty for non-performance of this agreement, estimated amount of freight.

Witness to the signature of {

Witness to the signature of {

APPENDIX II.

ORDINARY FORM OF BILL OF LADING, CONTAINING THE PRINCIPAL TERMS.

SHIPPED in good order and condition by [A. B., *merchant*] in and upon the good ship called [ ], whereof [C. D.] is master for this present voyage, and now moored in the [river] and bound to [San Francisco, forty cases of machinery and one hundred casks of starch], being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port [of], *the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever kind or nature soever excepted,* unto [E. F., *merchant*] or to his assigns, he or they paying freight for the said goods £ per ton, delivered with primage and average accustomed. In witness whereof the master of the said ship hath affirmed to [*three*] bills of lading all of this tenor and date, one of which bills being accomplished the others to stand void.

Dated at [ ], the day of

ADDENDA.

A BILL of lading excepted a shipowner from loss or damage arising from any act, neglect or default of the master, officers, crew, or any servant of the shipowner, "in providing, despatching, and navigating the ship or otherwise".

A dog was shipped and lost on the voyage owing to the negligence of the shipowner's servants by allowing him to run about loose. It was decided that the words "or otherwise" protected the shipowner from liability. See *Packwood* v. *Union Castle Steamship Co., Ltd.*, 20 *T.L.R.*, 59, decided 25th Nov., 1903. (This is the latest reported case on bills of lading.)

The power to tranship or warehouse goods does not take away the charterer's ordinary right to bring an action for detention of the ship if delivery is not taken as provided by the bill of lading—(The *Arne*).

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